(16)

No. 99-929-CFX Title: Rebecca McDowell Cook, Petitioner
v.
Don Gralike

Docketed: December 2, 1999 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Nov 29 1999	Petition for writ of certiorari filed. (Response due March 8, 2000)
	Dec 22 1999	Waiver of right of respondents Don Gralike, et al. to respond filed.
	Dec 29 1999	DISTRIBUTED for Conference of January 14, 2000
	Jan 7 2000	Response requested. (Due February 7, 2000)
	Jan 20 2000	Order extending time to file response to petition until March 8, 2000.
	Mar 8 2000	Brief of respondents Don Gralike, et al. in opposition filed.
	Mar 21 2000	Reply brief of petitioner Rebecca M. Cook filed.
	Mar 22 2000	REDISTRIBUTED for Conference of April 14, 2000
	Apr 17 2000	Petition GRANTED. SET FOR ARGUMENT November 6, 2000. **********
	May 17 2000	Order extending time to file petitioner's brief on the merits to and including June 23, 2000.
	Jun 22 2000	Joint appendix filed.
	Jun 22 2000	Brief of petitioner Rebecca M. Cook filed.
	Jun 22 2000	LODGING consisting of forty copies of U.C.Davis Law Review submitted by counsel for the petitioner
	Jun 23 2000	Brief amicus curiae of Missouri Term Limits filed.
	Jun 23 2000	Brief amicus curiae of Kris W. Kobach filed.
	Jun 23 2000	Brief amicus curiae of Nebraska filed.
	Jun 23 2000	Brief amicus curiae of Initiative and Referendum Institute filed.
	Jun 23 2000	Brief amicus curiae of U.S. PIRG Education Fund filed.
	Jul 10 2000	Order extending time to file respondent's brief on the merits to and including August 14, 2000.
	Aug 11 2000	Brief amici curiae of League of Women Voters of the United States, et al. filed.
	Aug 14 2000	Brief of respondents Don Gralike and Mike Harman filed.
	Aug 14 2000	Brief amicus curiae of James Madison Center for Free Speech filed.
	Aug 14 2000	Brief amicus curiae of United States filed.
	Aug 18 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 8 2000	Record filed.
	Sep 12 2000	Record filed.
	Sep 13 2000	Reply brief of petitioner Rebecca M. Cook filed.
	Sep 22 2000	CIRCULATED.
	Sep 25 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument distributed.
	Sep 26 2000	Motion of the Solicitor General for leave to participate

2 pp

No. 99-929-CFX

Entry	Date	Proceedings and Orders
		in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 6 2000	ARGUED.
	Nov 6 2000	ARGUED.

Supreme Court, U.S.
FILED

99 929 NOV 29 1999

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

Rebecca McDowell Cook,

Petitioner,

v.

Don Gralike,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. McADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel of Record

12111

QUESTIONS PRESENTED

I.

Do the people violate Article V of the Constitution when they participate in the evolution of their government by communicating their opinion to federal legislators or by communicating on the ballot to voters about the behavior of federal candidates?

II.

Do the people violate the Qualifications Clauses and the First Amendment when they comment on the ballot regarding an elected representative's actions and voting record or when they comment on the ballot about a non-incumbent congressional candidate's silence concerning a prospective constitutional amendment?

III.

Does the Speech and Debate Clause of the Constitution prohibit the people from commenting on the ballot about a federal legislator's actions and voting record in regard to a prospective constitutional amendment?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed n the caption except Michael Harmon, the 1998 Libertarian Party candidate for Missouri's Seventh Congressional District, who intervened as an appellee in the United States Court of Appeals for the Eighth Circuit after Donald Gralike withdrew as a candidate for the House of Representatives.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THIS WRIT 11

I. A CONFLICT EXISTS BETWEEN THE LOWER COURTS AS TO WHETHER ARTICLE V PROHIBITS CITIZENS FROM ADVISING FELLOW VOTERS AND THEIR ELECTED REPRESENTATIVES ON A PROSPECTIVE AMENDMENT, A CONFLICT THAT THE HISTORY OF ARTICLE V RESOLVES IN FAVOR OF CITIZEN PARTICIPATION. 13

A. The History of Citizen Instructions. 14

B. Conflicting Opinions and the Misinterpretation of the Constitution. 18

II. THE EIGHTH CIRCUIT SERIOUSLY MIS-CONSTRUED THE CONSTITUTION IN HOLDING THAT A MERE COMMENT ON THE SILENCE OR RECORD OF A CANDIDATE FOR CONGRESS CREATED A NEW QUALIFICATION FOR SERVICE IN CONGRESS. 22

III. MISSOURIANS DID NOT VIOLATE THE FIRST AMENDMENT BY COMMUNICATING ABOUT THE ACTUAL OR DESIRED CONDUCT OF CANDIDATES

FOR FEDERAL OFFICE AND THE EIGHTH CIRCUIT'S CONCLUSION THAT THEY DID CREATES A DANGEROUS PRECEDENT. 24

IV. MISSOURIANS DID NOT VIOLATE THE SPEECH AND DEBATE CLAUSE BY COMMENTING ON THE BEHAVIOR OF MEMBERS OF CONGRESS WHO WERE RUNNING FOR RE-ELECTION AND THE EIGHTH CIRCUIT'S CONCLUSION TO THE CONTRARY HAS FAR-REACHING, ADVERSE CONSEQUENCES. 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page**

Arkansas Term Limits v. Donavon, 519 U.S. 1149 (1997) . . . 13

Barker v. Hazeltine, 3 F.Supp.2d 1088 (D. S.D. 1998) . . . 13, 14

Baxter v. Palmigiano, 425 U.S. 308 (1976) 25

Bramberg v. Jones, 978 P.2d 1240 (Cal. 1999) 13

Burdick v. Takushi, 504 U.S. 428 (1992) 26, 27

Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 16

Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996) 13

Foster v. Love, 522 U.S. 67, 118 S.Ct. 464 (1997) 24

Gravel v. United States, 408 U.S. 606 (1972) 27, 28

Hawke v Smith, 253 U.S. 221 (1920) 18, 19

In re Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996) . 13

Kimble v. Swackhamer, 439 U.S. 1385 (1978) . . . 14, 18, 19, 21

League of Women Voters of Maine v. Gwadosky, 966 F.Supp. 52 (D. Me.1997) 13

Leser v. Garnett, 258 U.S. 130 (1922) 18, 19

Matter of Impeachment of Moriarty, 902 S.W.2d 273 (Mo. 1994) 29

Miami Herald Pub. Co., v. Tornillo, 418 U.S. 241 (1974) . . 26

Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) 11, 14, 19

Morrissey v. State of Colorado, 951 P.2d 911 (Colo. 1998) . . 13

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S.Ct. 1244 (1998) 25

Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997) . 13, 18, 19

Stanley v. Georgia, 394 U.S. 557 (1969) 25

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 24

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 20, 21, 24, 26, 27

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). 22-23

U.S. v. Helstoski, 442 U.S. 477 (1979) 28, 29

U.S. v. Johnson, 337 F.2d 180 (4th Cir. 1964), *aff'd.*, 383 U.S. 169 (1966) 28

Wooley v. Maynard, 430 U.S. 705 (1977) 26

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 3, 25, 26

U.S. Const. art. I, § 2, Cl. 2 . . . . . 2, 11, 22

U.S. Const. art. I, § 3, Cl. 3 . . . . . 2, 22

U.S. Const. art. I, § 4, Cl. 1 . . . . . 2, 24

U.S. Const. art. I, § 6, Cl. 1 2

U.S. Const. art. V 3, 10-14, 18, 19, 21, 22

Mo. Const. art. VIII, § 15 . . . . . 3, 8-11, 18-28

Mo. Const. art. VIII, § 16 . . . . . 3, 8, 9, 11

Mo. Const. art. VIII, § 17 . . . . . 4, 8-10, 25, 29

Mo. Const. art. VIII, § 18 . . . . . 5, 8-10, 29

Mo. Const. art. VIII, § 19 . . . . . 6, 8-10, 29

Mo. Const. art. VIII, § 20 7-9

Mo. Const. art. VIII, § 21 . . . . . 8, 9

Mo. Const. art. VIII, § 22 . . . . . 8, 9

Mo. Const. preamble 3

STATUTES

28 U.S.C. § 1254 (1) (1999) 2

28 U.S.C. § 1291 10

28 U.S.C. § 1331 10

42 U.S.C. § 1983 9

OTHER AUTHORITIES

Kris W. Kobach, *May "We The People" Speak? The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. Davis L. Rev. 1 (forthcoming Dec. 1999) 15-18

Official Manual of the State of Missouri 1997-1998, (Jim Grebing ed. 1997) 11, 20

Statement 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson) 21

Supreme Court Rule 14 2

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

Rebecca McDowell Cook,

Petitioner,

v.

Don Gralike,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Rebecca McDowell Cook, in her official capacity as the Secretary of State of Missouri, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ["App."] A1-35), entered on August 31, 1999, is reported at 191 F.3d 911. The opinion of the district court granting Gralike summary judgment (App. A27-35) is reported at 996 F.Supp. 917 (W.D. Mo. 1998) and the two district court orders denying petitioner's motions to dismiss (App. A36-81) are not reported.

JURISDICTION

The court of appeals entered its judgment on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1999) and pursuant to Supreme Court Rule 14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article 1, Section 2, Clause 2:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Constitution of the United States, Article 1, Section 3, Clause 3:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Constitution of the United States, Article 1, Section 4, Clause 1:

The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by Law, make or alter such Regulations, except as to the Places of choosing Senators.

Constitution of the United States, Article 1, Section 6, Clause 1:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be

questioned in any other Place.

Constitution of the United States, Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Constitution of the United States, Amendment I:

Congress shall make no law . . . abridging the freedom of speech . . . .

Constitution of the State of Missouri, Article VIII, Section 15:

PREAMBLE. The people of Missouri hereby state our intention that this initiative lead to the adoption of the following U.S. Constitutional Amendment:

Constitution of the State of Missouri, Article VIII, Section 16:

CONGRESSIONAL TERM LIMITS AMENDMENT
(a) No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of the United States Representative or who then holds the office shall serve for more than two additional terms.
(b) No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment

no person who has held the office of United States Senator or who then holds the office shall serve in the office for more than one additional term.

(c) Any state may enact by state constitutional amendment longer or shorter limits than those specified in section "a" or "b" herein.

(d) This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the several States.

Therefore, We, the People of the State of Missouri, have chosen to amend the state constitution to inform voters regarding incumbent and non-incumbent federal candidates' support for the above proposed CONGRESSIONAL TERM LIMITS AMENDMENT.

Constitution of the State of Missouri, Article VIII, Section 17:

VOTER INSTRUCTION ON TERM LIMITS FOR MEMBERS OF CONGRESS

(1) We, the Voters of Missouri, hereby instruct each member of our congressional delegation to use all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth above.

(2) All primary and general election ballots shall have printed the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" adjacent to the name of any United States Senator or Representative who:

(a) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote or;

(b) fails to second the proposed Congressional Term Limits Amendment set forth above if it lacks for a second before any proceeding of the legislative body or;

(c) fails to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above or;

(d) fails to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment set forth above before any committee or subcommittee of the respective house upon which he or she serves or;

(e) fails to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment set forth above or;

(f) fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed Congressional Term Limits Amendment set forth above regardless of any other actions in support of the proposed Congressional Term Limits Amendment set forth above or;

(g) sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above, or;

(h) fails to ensure that all votes on Congressional Term Limits are recorded and made available to the public.

(3) The information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of incumbent candidates for Congress if the Congressional Term Limits Amendment set forth above is before the states for ratification or has become part of the United States Constitution.

Constitution of the State of Missouri, Article VIII, Section 18:

VOTER INSTRUCTION ON TERM LIMIT PLEDGE FOR NON-INCUMBENTS

(1) Non-incumbent candidates for United States Senator and Representative shall be given an opportunity to take a "Term Limit" pledge regarding "Term Limits" each time they file to run for such office. Those who decline to take the "Term Limits" pledge shall have the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their name on every primary and general election ballot.

(2) The "Term Limits" pledge shall be offered to non-incumbent candidates for United States Senator and Representative until a Constitutional Amendment which limits the number of terms of United States Senators to no more than two and United States Representatives to no more than three shall have become part of our United States Constitution.

(3) The "Term Limits" pledge that each non-incumbent candidate, set forth above, shall be offered is as follows:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

Constitution of the State of Missouri, Article VIII, Section 19:

DESIGNATION

(1) The Secretary of State shall be responsible to make an accurate determination as to whether a candidate for the federal legislature shall have placed adjacent to his or her name on the election ballot the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

(2) The Secretary of State shall consider timely submitted public comments prior to making the determination required in subsection (1) of this section and may rely on such comments and any information submitted by the candidates in making the determination required in subsection (1).

(3) The Secretary of State, in accordance with subsection (1) of this section shall determine and declare what information, if any, shall appear adjacent to the names of each incumbent federal legislator if he or she was to be a candidate in the next election. This determination and declaration shall be made in a fashion necessary to ensure the orderly printing of primary and general election ballots with allowance made for all legal action provided in section (5) and (6) below, and shall be based upon each member of Congress's action during their current term of office and any

action taken in any concluded term, if such action was taken after the determination and declaration was made by the Secretary of State in a previous election.

(4) The Secretary of State shall determine and declare what information, if any, will appear adjacent to the names of non-incumbent candidates for the federal legislature, not later than five (5) business days after the deadline for filing for the office.

(5) If the Secretary of State makes the determination that the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall not be placed on the ballot adjacent to the name of a candidate for the federal legislature, any elector may appeal such decision within five (5) business days to the Missouri Supreme Court as an original action or shall waive any right to appeal such decision; in which case the burden of proof shall be upon the Secretary of State to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in the Act and therefore should not have the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidate's name.

(6) If the Secretary of State determines that the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall be placed on the ballot adjacent to a candidate's name, the candidate may appeal such decision within five (5) business days to the Missouri Supreme Court as an original action or shall waive any right to appeal such decision; in which case the burden of proof shall be upon the candidate to demonstrate by clear and convincing evidence that he or she should not have the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidate's name.

(7) The Supreme Court shall hear the appeal provided for in subsection (5) and issue a decision within 60 days. The Supreme Court shall hear the appeal provided for in subsection (6) and issue a decision not later than 61 days before the date of the election.

Constitution of the State of Missouri, Article VIII, Section 20:

AUTOMATIC REPEAL

At such time as the Congressional Term Limits Amendment set forth above has become part of the U.S. Constitution, section 15 through section 22 of this Article automatically shall be repealed.

Constitution of the State of Missouri, Article VIII, Section 21:

JURISDICTION

Any legal challenge to this Amendment shall be filed as an original action before the Supreme Court of this State.

Constitution of the State of Missouri, Article VIII, Section 22:

SEVERABILITY

If any portion, clause, or phrase of this Amendment is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

STATEMENT OF THE CASE

This case concerns an opinion by a circuit court concluding that the Constitution prohibits citizens from communicating their opinion to federal legislators on prospective constitutional amendments and further prohibits the citizens from communicating on the ballot to voters about the behavior of candidates for federal office. While the prospective constitutional amendment at issue involved term limits, this case is not about term limits. Rather, we are concerned here with the right of the people to communicate.

On November 5, 1996, Missouri's voters passed a ballot measure amending Article VIII of the Missouri Constitution by adding new sections 15 through 22. The people themselves proposed the measure by initiative petition.

By amending Article VIII, the people of Missouri called on their elected representatives to enact an amendment to the

Constitution of the United States placing limits on the number of terms that individuals could serve in Congress. *See* Mo. Const. art. VIII, §§ 15 & 16. In section 17 of Article VIII, the voters instructed the members of Missouri's Congressional delegation to use their powers to pass the Congressional Term Limits Amendment included in Article VIII, § 16. The people provided that any member of Congress who failed to engage in eight specified behaviors would have the phrase "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed next to his or her name on subsequent primary or general election ballots. Art. VIII, § 17(2)(a-g).

In Article VIII, section 18, the people offered all non-incumbent candidates for Congress the opportunity to pledge support for the term limits amendment set forth in Article VIII, § 16. The pledge was not mandatory, and a non-incumbent candidate's silence in the face of the opportunity to take the pledge would not prevent the candidate from being on the ballot. Rather, if a candidate responded to the opportunity with silence or affirmative declination, the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" would be printed adjacent to the candidate's name on the primary and general election ballots.

The remaining provisions were procedures for the proper implementation of Article VIII. In Article VIII, section 19, the people gave Missouri's Secretary of State the ministerial task of assessing whether the people would be informed about a candidate's behavior. Section 20 authorized an automatic repeal of Article VIII, sections 15-22, when the Congressional Term Limits Amendment in section 16 became a part of the United States Constitution. Article VIII, section 21 grants the Missouri Supreme Court original jurisdiction to hear any challenges to Article VIII. And Article VIII, section 22 contains a severability clause which, in the event any provision of Article VIII were found to be unconstitutional, would sever the unconstitutional provision from the remainder of the Article.

On December 11, 1996, Donald Gralike filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court for the

Western District of Missouri. Gralike named as a defendant the Missouri Secretary of State, Rebecca McDowell Cook, in her official capacity. In his Complaint, Gralike challenged the constitutionality of Article VIII. Thus, the district court had jurisdiction over the suit pursuant to 28 U.S.C. § 1331 because the suit raised a federal question.

After denying petitioner's two motions to dismiss (App. A36-81), the district court granted Gralike summary judgment on February 18, 1998. In its Order, the district court concluded Article VIII: (1) added qualifications for Congress members in violation of the Qualifications Clauses by commenting on the members performance; (2) violated Gralike's first amendment right to free speech by commenting on either the members statements, actions or silence; and (3) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment. App. A27-35. In response, Cook filed a timely notice of appeal.

On August 31, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the district court, exercising jurisdiction pursuant to 28 U.S.C. § 1291. The majority agreed with the district court and concluded Article VIII: (1) added qualifications for Congress members in violation of the Qualifications Clauses by commenting on the members performance; (2) violated Gralike's first amendment right to free speech by commenting on either the members statements, actions or silence; and (3) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment. App. A14-15. The court of appeals also reached an issue not raised by either party. It determined that Article VIII violated the Speech and Debate Clause of the Constitution by allowing the citizenry to comment on Congress members performance. App. A14-15.

Judge Hansen concurred in part and dissented in part from the majority's holding. He believed the court of appeals should have found Article VIII, §§ 17, 18 and 19 unconstitutional but left the remaining portions of Article VIII untouched, similar to an

earlier panel decision in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999). The judge stated §§ 15 and 16 were only advisory, and thus constitutionally sound. Specifically, Judge Hansen stated he "believed the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I." App. A23-26. The judge continued:

> In fact, "We the People" have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment procedures set out in Article V. However, the people play a crucial, substantive role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures.

App. A24-25.

REASONS FOR GRANTING THIS WRIT

On November 5, 1996, the people of Missouri went to the polls and informed their members of Congress that it was time to amend the Constitution. The people relayed this information by approving an initiative petition placing an "instruct and inform" provision in the Missouri Constitution.[1] But despite the popular will, the United States Court of Appeals for the Eighth Circuit nullified the actions of the citizens of Missouri, determining that the citizens could not advise their elected officials about the need

---

[1] On the November 5, 1996, ballot, the instruct and inform provision was entitled Constitutional Amendment No. 9. It garnered more than 57% of the popular vote. And it carried 86 of Missouri's 114 counties. The provision also carried St. Louis City -- a city which is not within any county. *Official Manual of the State of Missouri 1997-1998*, p. 591 (Jim Grebing ed. 1997).

for proposing and ratifying a particular constitutional amendment.

The issue of whether the voters may instruct their Congressional delegation to pass a constitutional amendment and advise their fellow citizens of their representative's behavior regarding the amendment has not arisen in the Eighth Circuit alone. Instead, it has been heard, and decided incorrectly, by Courts across the nation, albeit for differing reasons.

With regard to that portion of the Eighth Circuit's opinion that finds Missourians violated Article V by instructing their congressional delegation to support a particular constitutional amendment, this Court should grant the petition because there is a conflict between the Eighth Circuit's opinion in this case and the Supreme Court of Idaho, an opinion authored by then Justice Rehnquist and an earlier opinion of the Eighth Circuit. With regard to the remainder of the court's holding that Missourians violated Article V, the Qualifications Clauses, the Speech and Debate Clause and the First Amendment by communicating on the ballot about the behavior of candidates for federal office regarding a proposed constitutional amendment, the Court should grant the petition because of the importance of the issues involved; i.e., the citizens' right to communicate and the misapplication of the Constitution to prohibit that communication. It is of grave constitutional concern to the citizenry that so many courts have construed the Constitution to prohibit truthful public speech for the protection of a portion of the candidates for federal office.

Court decisions that interfere with the public's right to communicate occurring at the behest of the electoral process not only frustrate the public will, in this context they undermine America's social contract that provides for the citizenry to determine the form of their government. No provision of the Constitution mandated the Eighth Circuit's interference with the public's right to speak. Unless this Court intervenes, the meaning of various provisions of the Constitution will continue to be perverted and the estrangement of the people from the government they once ordained will continue to be exacerbated. The Court should grant the petition for a writ of certiorari to preserve the

integrity of the Constitution and secure the liberties of the American people.

I. A CONFLICT EXISTS BETWEEN THE LOWER COURTS AS TO WHETHER ARTICLE V PROHIBITS CITIZENS FROM ADVISING FELLOW VOTERS AND THEIR ELECTED REPRESENTATIVES ON A PROSPECTIVE AMENDMENT, A CONFLICT THAT THE HISTORY OF ARTICLE V RESOLVES IN FAVOR OF CITIZEN PARTICIPATION.

A panel of the Eighth Circuit held that the people of Missouri could not instruct their elected representatives to use their powers to propose a particular amendment to the Constitution because such an instruction would usurp Congress's Article V power. There exists conflicts between many federal courts and the Supreme Court of Idaho, a prior opinion of the Eighth Circuit and the opinion of the Chief Justice on this issue. *Compare Barker v. Hazeltine*, 3 F.Supp.2d 1088 (D. S.D. 1998) (invalidated instruct and inform provision on Article V, First Amendment, Speech and Debate, and Due Process grounds); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D. Me.1997) (invalidated instruct and inform provision on Article V grounds); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996) (instruct and inform initiative invalidated on Article V and state constitutional law grounds);[2] *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999) (invalidated instruct and inform provision on Article V and state initiative law grounds); *Morrissey v. State of Colorado*, 951 P.2d 911 (Colo. 1998) (invalidated instruct and inform provision on Article V grounds) and *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (invalidated instruct and inform provisions on Article V and state constitutional grounds) with *Simpson v. Cenarrusa*, 944 P.2d 1372

---

[2] This court denied certiorari. *Arkansas Term Limits v. Donavon*, 519 U.S. 1149 (1997). However, in *Donavon*, there were independent state grounds that precluded review. The Arkansas Supreme Court found that the initiative petition that created the instruct and inform provision violated Amendment VII of the Arkansas Constitution. 931 S.W.2d at 371. Here no state law issues preclude review of the Eighth Circuit's decision.

(Idaho 1997) (invalidated instruct and inform provision on First Amendment, Speech and Debate Clause, and state constitutional grounds, but expressly held that the instruct provision did not violate Article V); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (invalidated only the inform portion of Nebraska's instruct and inform provision on Article V grounds) and *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., sitting as Circuit Justice) (Article V does not prohibit citizens from advising their legislators on a prospective constitutional amendment).

In reaching the conclusion that the Constitution prohibited the people of Missouri from instructing their elected representatives to propose an amendment to the Constitution (App. A22, n. 12) the Eighth Circuit opined that Article V "specifically delegates the amendment process to the legislative bodies, not the voters." App. A20. While Article V delegates the functions of official amendment proposal and passage to the legislative bodies, the Constitution does not thereby constrain the citizenry to silence during the constitutional drama.

The Court's holding elevates legislators to the level of paternalistic aristocrats and simultaneously demeans them as irresolute souls incapable of withstanding the meaningless chatter of their lesser citizens.[3] Apparently, according to the Eighth Circuit, the founders so feared citizen influence over hapless elected officials, they wrote Article V for the purpose of insulating overly-responsive legislators from the presumptively unsound influences of the governed. This ruling is not only anti-democratic, it ignores the pre- and post- ratification history of the Constitution.

A. The History of Citizen Instructions.

[3] This type of governmental paternalism was best evidenced in *Barker*, cited in *Gralike*. App. A2. The district court in *Barker* found that the amendment process was "to be a deliberate and often difficult task," with the "citizens' role to elect competent state and Congressional legislators who may, in turn, amend the Constitution in accordance with the methods described in Article V." 3 F.Supp.2d at 1092 (citation omitted). Apparently, simple voters were to be seen but not heard.

Throughout the history of the United States, the people have instructed their representatives on the form of government they desired. The delegates to the Second Continental Congress from the states of North Carolina, Virginia, and New Jersey were all under instructions from their respective home colonies to vote for independence.[4] In fact, the delegates from New York considered their instructions to be so important that they read them aloud before the Continental Congress.[5]

Even more compelling evidence of the Framer's intention to allow citizens to instruct their delegates about prospective constitutional amendments is the fact that several Framers were acting pursuant to instructions when they drafted the Constitution itself. For example, Delaware's delegates to the Constitutional Convention were acting under specific instructions to preserve the Fifth Article of the Articles of Confederation, which provided each state would receive a single vote in Congress.[6]

Further, the statements of the framers themselves indicate that they understood the people to be able to instruct their delegates

[4] *See* Independence in North Carolina (April 12, 1776), *reprinted in* 5 *American Archives, Fourth Series* 859, 859 (Peter Force ed., 1844); Records of the Virginia Convention (May 15, 1776), *reprinted in* 6 *American Archives, Fourth Series* 1523, 1524 (Peter Force, ed., 1846); Records of the New York Provincial Congress, *reprinted in* 6 *American Archives, Fourth Series* 1364, 1364 (Peter Force, ed., 1846); *all cited in*, Kris W. Kobach, *May "We The People" Speak? The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. Davis L. Rev. 1 (forthcoming Dec. 1999) (manuscript at pp. 44-46, lodged with the Court and on file with the author). In fact, surviving records indicate that the delegates from nine of the thirteen colonies acted pursuant to instructions from home.

[5] Records of the Continental Congress (June 28, 1776), *reprinted in* 6 *American Archives, Fourth Series* 1725, 1725 (Peter Force, ed., 1846); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 53).

[6] 3 *The Records of the Federal Convention of 1787* 574-575 (Max Farrand ed., 1966); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 66).

to Congress. In reference to a possible, future increase in the size of Congress, Alexander Hamilton commented:

> "[i]f the general voice of the people be for an increase, it must undoubtedly take place. They have it in their power to instruct their representatives; and the State Legislators, which appoint the Senators, may enjoin it also upon them."[7]

Additionally, in reference to the amendment process itself, John Dickinson, delegate from Delaware, stated:

> [f]or this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations [to the Constitution] respectively required by them, and to enjoin their representatives, to employ every proper method to obtain ratification.[8]

Several states also instructed their representatives to the first Congress on how to vote on the Bill of Rights and the Eleventh Amendment. Congressmen from Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina all arrived at the first Congress bearing instructions as to their vote on the Bill of Rights.[9] And in the wake of *Chisolm v. Georgia*, 2 U.S.

---

[7] Alexander Hamilton, Statement before the New York Ratifying Convention (June 23, 1788), *reprinted in* 2 *Elliot's Debates*, at 252 (Jonathon Elliot ed., 1836) (June 21, 1788); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at pp. 72-73).

[8] John Dickinson, *The Letters of Fabius, Pamphlet No. VII* (1797), *reprinted in Friends of the Constitution: Writings of the "Other" Federalists 1787-1788*, at 496 (Colleen A. Sheehan and Gary L. McDowell eds., 1998); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 70).

[9] Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 76) (citations omitted).

(2 Dall.) 419 (1793), the legislatures of Massachusetts, Virginia, Connecticut and North Carolina instructed their Senators to seek a constitutional amendment that would deny federal courts jurisdiction over suits by citizens against states.[10]

This tradition of instruction continued into the Twentieth Century. In 1928, the voters of Massachusetts, by initiative, instructed their State Senators to repeal the Eighteenth Amendment.[11] And in 1933, the state of Oregon held a statewide referendum to determine how the state's delegates to the statewide convention[12] should vote on the ratification of the Twenty-First amendment. The people voted in favor of ratification and, seventeen days later, the state convention ratified the Twenty-First Amendment.[13] Accordingly, the intent of the Framers and the weight of history demonstrate the constitutionality of citizen instructions to their representatives in Congress regarding how vote on a prospective amendment.[14]

---

[10] Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 85) (citations omitted).

[11] *See* 1929 *Mass. Acts* 544-52 (tallying votes of senatorial districts); Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government*, at 476-477 (1930); *both cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 97).

[12] The Twenty-First Amendment, unlike any other amendment to the Constitution, was sent to state-wide conventions, not state legislators, for approval. Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 100).

[13] 1933 Oregon Laws, 2d Special Sess. 10 (1933); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at pp. 100-101).

[14] While the history on the inform provisions is not as developed, the reason for this lack of development is readily apparent: At the time of the Framers, no self-respecting Congressman would remain in Congress after ignoring the instructions of their constituents. Instead, they would simply retire on their own, thus eliminating any need for an inform provision. In fact, two future presidents, John Quincy Adams and John Tyler, actually did retire after ignoring the instructions of their constituents. Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep*

B. Conflicting Opinions and the Misinterpretation of the Constitution.

Most courts that have analyzed instruct and inform provisions have failed to discern or simply ignored the history of Article V, erroneously relying on *Hawke v Smith*, 253 U.S. 221 (1920); and *Leser v. Garnett*, 258 U.S. 130 (1922). *See Gralike*, App. A19-22. But neither case is relevant to the issue at hand, a fact noted by Chief Justice Rehnquest in *Kimble*. *See* 439 U.S. at 1387 (applicant's reliance on Court's decision in *Hawke* and *Leser* "is obviously misplaced").

In *Hawke*, the Court struck down on Article V grounds a provision of the Ohio Constitution that gave the people final authority to approve or reject an amendment to the Constitution. In *Leser*, the Court again held that the actual power to ratify an amendment may not be altered by the people of a state, but the Court in *Leser* made no mention of the citizens supposed inability to instruct their legislators.[15] 258 U.S. 130. While both these cases dealt with a direct attempt to modify the ratification process, Missouri's Article VIII does no such thing. Rather, it informs the Missouri delegation to Congress of their constituent's wishes. It is still the Senators and Representatives who will cast the vote. Accordingly, Missouri's Article VIII in no way alters the process established by Article V.

Nevertheless, most courts evaluating instruct and inform provisions have determined that they violate Article V. Fortunately, some courts have conducted a more exacting analysis. In *Simpson*, the Idaho Supreme Court conducted an Article V review of legislation instructing Idaho's elected representatives to

---

Trying to Change It? at 123 (1993); *cited in*, Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at p. 90).

[15] In fact, in the years following the Court's decision in *Leser*, the citizens of Massachusetts and Oregon did instruct their legislators or delegates how to vote on an amendment. Kobach, *May "We The People" Speak?* 33 U.C. Davis L. Rev. 1 (manuscript at pp. 97 & 100-101).

support term limits. The Court found no Article V violation because the legislators, when merely directed to support term limits, "were not compelled to support the proposed amendment." 944 P.2d at 1376. Hence, the Article V process was undisturbed.

Similarly, in *Kimble*, then Justice Rehnquist held that it was constitutional for the citizens of Nevada to advise their legislators how to vote on the Equal Rights Amendment. 439 U.S. 1385. He said, "I would be most disinclined to read either *Hawke*, . . . *Leser* . . . or Art. V as ruling out communication between members of the legislature and their constituents." *Id.* at 1387-88. He further noted that, despite the referendum, the legislators could still vote as they saw fit, thus the referendum was non-binding. *Id.* at 1387. *See also Miller*, 169 F.3d at 1126 and *Gralike*, (Hanson, J., dissenting), App. A23-26, (determining that the citizens could constitutionally express their opinions on prospective constitutional amendments by way of initiative petitions).

The Eighth Circuit Court of Appeals attempted to distinguish *Kimble* by asserting that Missouri's Article VIII is "far more" than the non-binding referendum found in *Kimble*. App. A21. This truism is not a substitute for applying the principles articulated in *Kimble* to the facts of the case. According to the Chief Justice, only those matters that change the actual process set out in Article V are of constitutional significance. That the Nevada legislature was likely to delay a vote on the amendment until after the non-binding referendum did not alter the constitutional process and was "not a constitutionally cognizable grievance." *Id.* at 1387. Not surprisingly, following the vote, the Nevada legislature complied with their citizen's wishes. But political responsiveness is not indicative of a constitutional violation.

Like *Kimble*, Missouri's Article VIII does not run afoul of Article V because it does nothing to change the Article V process for amendment ratification. But the Eighth Circuit found that Missouri's Article VIII violated Article V because it bound legislators to vote in favor of a constitutional amendment. App. A21-22. In reaching this conclusion, the Eighth Circuit made two

unsubstantiated assumptions;[16] one, that the ballot information would operate as a handicap on candidates and, two, that candidates would ignore their own principled opinion despite the constitutional significance of their behavior to avoid the supposedly coercive impact of the ballot information. App. A21-22. Such assumptions are antithetical to our constitutional jurisprudence.

There is a dearth of evidence on the issue of handicap and respondent bore the burden of proof. That 57% of Missouri's electorate favored the term limits proposal at the 1996 election does not turn the ballot information into a penalty. The voters in subsequent years might have a different political view. In the twenty-eight counties that failed to support the amendment of Article VIII,[17] the ballot information may be a benefit. Truthful words cannot properly be denominated a penalty when their supposed penal nature is entirely dependent on the potentially changing opinions of the electorate. For example, in many locales it is reasonable to assume a particular party designation may have the "likely effect" of handicapping a candidate. But it is constitutional to require party candidates to run with their party designations on the ballot. Respondent never demonstrated a difference of constitutional significance between compulsory party designation and the ballot information Missourians now seek to put on the ballot.[18]

---

[16] This is not the first time the Eighth Circuit has made unfounded assumptions when assessing the validity of an election law. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997); this Court noted that "[t]he Court of Appeals emphasized its belief that, without fusion-based alliances, minor parties cannot thrive. This is a predictive judgment which is by no means self-evident."

[17] *Official Manual of the State of Missouri 1997-1998*, p. 591 (Jim Grebing ed. 1997).

[18] The Eighth Circuit does criticize the words chosen by Missourians to communicate about the behavior of federal candidates, describing it as language "likely to give (and we believe calculated to give) a negative impression not only of the labeled candidates' views on term limits, but also of his or her commitment and accountability to his or her constituents." App. A9. While it is not insignificant that the Court is so at ease measuring the words chosen by the people

The Eighth Circuit's second assumption, unstated but implicit and necessary to find Article VIII binding, is far more insidious. No judge charged with the obligation to preserve the Constitution should assume that members of Congress are craven, office-seekers who will disregard their principles and the constitutional significance of their behavior, voting only for constitutional enactments they perceive will enhance their likelihood of re-election.[19]

The Eighth Circuit's assumptions were false. Article VIII is by its terms non-binding; it does not alter the process established by Article V. While it does advise the members of Congress how the people want them to vote, they "may vote for or against ratification, or refrain from voting on ratification at all, without regard to the [people's instruction]." *Kimble*, 439 U.S. at 1387. Nothing in Article V prohibits Missourians from communicating with one another on the ballot. In fact, while this Court has found that the ballot can be used "to communicate information," *Timmons*, 520 U.S. at 363, the same cannot be said with any

---

to communicate their ideas, it is obvious that the Court paints with too broad a brush. See App. A18, where the Court says that the "labels state that the labeled candidates ignore their constituents' wishes." While the statement to be applied to incumbents ("disregarded voters' instructions on term limits") may have some risk despite its relatively nebulous nature of leaving a negative impression with voters, the statement to be applied to non-incumbents ("declined to pledge to support term limits") is a completely neutral statement of fact regarding a candidate's behavior that embodies no such risk and it is only this later label that could have been applied to respondent. If it was only the language selected by Missourians to communicate their ideas that offends the Constitution, the Eighth Circuit failed in its obligation to so state.

[19] In fact, available evidence is to the contrary. Missouri Representative Jo Ann Emerson announced on the floor of the House that she would depart from the instructions of her constituents. Though Article VIII instructed Rep. Emerson to vote against any term limits proposal of more than six years, she declared that she "w[ould] vote in favor of each and every serious term limits proposal brought before the House," not just the one set forth in Article VIII. Statement 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson). Apparently, Rep. Emerson did not consider the ballot information a significant handicap as she was quite capable of overlooking it or she was guided by her duty to vote her conscience regardless of the consequences.

degree of certaintity after the Eighth Circuit's chilling decision.

The Eighth Circuit erred in finding that Missouri's Article VIII violated Article V. It was an error that ignored the intent of the Framers, the history surrounding the ratification of our Constitution, the opinion of the Chief Justice of this Court and the right of the people to participate meaningfully in their government. It is an error that can only be corrected by this Court.

II. THE EIGHTH CIRCUIT SERIOUSLY MISCONSTRUED THE CONSTITUTION IN HOLDING THAT A MERE COMMENT ON THE SILENCE OR RECORD OF A CANDIDATE FOR CONGRESS CREATED A NEW QUALIFICATION FOR SERVICE IN CONGRESS.

In its opinion striking down Article VIII of the Missouri Constitution, the Eighth Circuit found that allowing the people to publicly comment on a congressional candidate's behavior violated the Qualifications Clauses. App. A15-19. But there is no legal basis for the Eighth Circuit's opinion because this information neither directly nor indirectly places an additional qualification on members of Congress. This Court should grant the petition to correct this error and forestall its far-reaching implications.

The United States Constitution restricts who may appear on a ballot as a candidate for Congress through the Qualification Clauses. U.S. Const., art. I, §§ 2 & 3. The restrictions found in the Qualifications Clauses are fixed and exclusive. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995). However, Missouri does not place an additional qualification on service in Congress; all Missourians over the age of twenty-five who have been U.S. citizens for more than seven years may still be elected to the House of Representatives and may still appear on the ballot.

Of course, Missourians cannot indirectly place an additional qualification on a candidate for Congress. *U.S. Term Limits*, 514 U.S. at 836. But Article VIII places no indirect qualifications on candidates. In *U.S. Term Limits*, the Court held that a state amendment that disqualifies a class of candidates *and* has the sole

purpose of creating additional qualifications indirectly violates the Constitution. *Id.* Thus, *U.S. Term Limits* requires *both* an electoral injury and an intent to create additional qualifications for a finding of unconstitutionality. Article VIII does neither.

The Eighth Circuit simply assumed that having the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appearing by a candidate's name would have the "likely effect" of handicapping the candidate. As discussed above, the Eighth Circuit's assumption is not supported by any facts in the record. And the mere fact that some voter "might," in the opinion of the Eighth Circuit, be affected by such language does not create a constitutionally impermissible handicap.

Further, it was not the people of Missouri's intent to create an additional qualification for Congress when they passed Article VIII. Instead, their intent was to amend the Constitution and for that amendment to create a limitation on congressional service. In fact, Article VIII, section 15, specifically states that the intent of Article VIII is to amend the Constitution. Despite this, the Eighth Circuit concluded that the intent of people of Missouri was to add an additional qualification for service in Congress. App. A18-19. While the desired amendment would alter the Constitution to place a limitation on members of Congress, that fact does not alter the people's purpose. The people's purpose was to effect the amendment of the Constitution[20] and construing the same to run afoul of the Qualifications Clauses has a broad range of significant adverse consequences. Suppose, for example, that the citizens of a state directed an executive office holder to prepare a ballot

---

[20] The Eighth Circuit claims that, as the people of Missouri seek to amend the Constitution to add a limitation on congressional service, their actions run afoul of the Qualifications Clauses because their purpose is the addition of a new qualification. App A18. The fact that Missourians seek to effectuate this change by amending the Constitution is, apparently, irrelevant. This argument goes too far. It would place a bar on public support for any amendment to the Qualifications Clauses. This simply cannot be. Instead, when assessing the purpose behind the actions of the people, the Court should draw distinction between the purpose of the action, amending the Constitution, and the purpose of the desired amendment, creating a new qualification for service in Congress.

information sheet containing the voting records and absentee percentages of candidates, directing that the same be available at polling places. Would candidates for federal office be able to challenge the ballot information sheet, to the extent they felt historical facts portray them in a negative light, asserting that the communication created an additional qualification for office? While nothing in the Constitution mandates such a result, nothing in the Eighth Circuit's opinion precludes it.

Furthermore, the Eighth Circuit's conclusion that Missouri's Article VIII violates the Qualifications Clauses utterly ignores the Constitution's affirmative grant of power to the states. The Constitution grants states "broad power to prescribe the 'Time, Place and Manner of holding elections for Senators and Representatives.'" *Timmons*, 520 U.S. at 358, quoting from *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). All Article VIII of the Missouri Constitution does is disclose whether candidates for Congress performed as their constituents wished or remained silent when offered an opportunity to support term limits. Congress has enacted no law prohibiting the people of a state from adopting this manner of conducting an election and the Constitution contains no prohibition on this activity. Hence, the Constitution's default provision, Art . I, § 4, cl. 1, which "invests the States with responsibility for the mechanics of congressional elections," controls. *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 466 (1997).

The Eighth Circuit's failure to recognize that Missourians have successfully walked a constitutional tightrope was error. It was error that deprived the people of their voice in government and that took from the people an opportunity to control their own government. It is an error that only this Court can correct.

III. MISSOURIANS DID NOT VIOLATE THE FIRST AMENDMENT BY COMMUNICATING ABOUT THE ACTUAL OR DESIRED CONDUCT OF CANDIDATES FOR FEDERAL OFFICE AND THE EIGHTH CIRCUIT'S CONCLUSION THAT THEY DID CREATES A DANGEROUS PRECEDENT.

The Eighth Circuit found Missouri's Article VIII violative of the First Amendment without even conducting a complete analysis; lumping the regulations for incumbents in with those for non-incumbents. By this flawed analysis, the Eighth Circuit deprived the people of their own right to speak without even balancing the people's right against that of the candidates. This Court should grant the petition for a writ of certiorari so that people's voice can be restored.

The people's right to know and the related right to receive information are recognized by the Supreme Court as fundamental tenets of the First Amendment. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Constitution protects rights to receive information and ideas). In an attempt to transform this right from an ideal into a reality, the citizens of Missouri requested information about their Congressional candidates' position on term limits. And by doing so, the people did not violate the First Amendment; instead they exercised their own First Amendment rights. Furthermore, they exercised these rights in a way that did not limit the speech of the candidates.

The First Amendment to the United States Constitution states that "[C]ongress shall make no law . . . abridging the freedom of speech . . .." U.S. Const. amend. I. However, freedom of speech does not mean that a person can say (or keep from saying) anything. And in the non-criminal context, this Court has repeatedly held that it is appropriate to comment on another's silence, and even draw an inference from another's silence. *See e.g., Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 1252-1253 (1998); *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976). Insofar as Article VIII, section 17 applies to non-incumbents, that is all that occurs. The people comment on the candidate's failure to take a pledge to support a term limits amendment.[21] Mo. Const. art. VIII, § 17. They do not require the

---

[21] For incumbents, the people simply comment on the incumbent's failure to propose or support a particular term limits amendment. Mo. Const. art. VIII, § 17(2)(a-g). Thus, petitioner's argument that no free speech right of a non-incumbent is being violated can be made with equal force as to incumbents.

candidate to take the pledge; nor do they punish the candidate for failing to take the pledge. The people simply observe that a candidate did not take the pledge. And that is constitutionally sound.

Instead of recognizing the constitutionality of Article VIII, the Eighth Circuit relied on *Wooley v. Maynard*, 430 U.S. 705 (1977); and *Miami Herald Pub. Co., v. Tornillo*, 418 U.S. 241 (1974), for the proposition that the government may not compel someone to speak. Concededly, the Court did find compelled speech to be unconstitutional in these two cases, but these cases are inapplicable to an analysis of Article VIII because it does not compel any speech. In both *Wooley* and *Miami Herald*, the government compelled speech under threat of criminal prosecution. Article VIII does no such thing. Instead, the people simply comment on the silence or behavior of their congressional candidates. The peoples' communication is not punishment.[22] Accordingly, the court of appeals reliance on *Wooley* and *Miami Herald* was misplaced.

Further, once the court of appeals erroneously concluded that Article VIII abridged speech, it then failed to apply the proper test to determine whether the Article is constitutional. Under *Timmons*, there is no one test for determining whether an election law, like Article VIII, violates the First Amendment. 520 U.S. at 358-59 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). Rather, the level of scrutiny is dependent on the burden the election law places on the plaintiff's rights. *Timmons*, 520 U.S. at 358-59. But instead of making this assessment, the Eighth Circuit committed the same error it committed in *Timmons* itself: it simply assumed that strict scrutiny applied. *Gralike*, App. A11-14. The Eighth Circuit simply never made the assessment about the First Amendment

[22] In its First Amendment analysis, the Eighth Circuit committed the same error that was prevalent throughout its opinion. The court assumed that the ballot information would be some sort of punishment. The court based this assumption on the feeling that a ballot information would cause voters to not vote for a candidate. However, no evidence on this point was produced and, hence, it is unclear what effect the ballot information would have on any election.

burden articulated in *Timmons* and *Burdick*.[23] Thus, it failed to apply the test mandated by this Court.

The Eighth Circuit should have recognized that Article VIII compels nothing and, hence, avoids the strictures of the free speech clause. And failing that, it should have applied the proper test to determine whether this election regulation was unconstitutional. The Eighth Circuit's failure to do either was error, an error that ignored the language of Article VIII, that deprived the people of their right to speak about the behavior of political candidates and an error that can only be corrected by this Court.

IV. MISSOURIANS DID NOT VIOLATE THE SPEECH AND DEBATE CLAUSE BY COMMENTING ON THE BEHAVIOR OF MEMBERS OF CONGRESS WHO WERE RUNNING FOR RE-ELECTION AND THE EIGHTH CIRCUIT'S CONCLUSION TO THE CONTRARY HAS FAR-REACHING, ADVERSE CONSEQUENCES.

The Eighth Circuit essentially held that the Speech and Debate Clause of the U.S. Constitution is violated when citizens comment on their Congressional representative's behavior. App. A14-15. This argument is both anti-democratic and absurd. Taken to its logical conclusion, the Eighth Circuit's opinion would lead to the creation of an Congressional aristocracy, immune from the criticisms of we simple voters.

While the Eighth Circuit was correct in citing to *Gravel v. United States*, 408 U.S. 606 (1972), for an understanding of the Speech and Debate Clause, the court incompletely quoted *Gravel*

[23] Concededly, in footnote 8 of its opinion, the court of appeals claimed that even under *Burdick*, strict scrutiny would apply because Article VIII is a content-based and viewpoint-based speech restriction. *Gralike*, App. A12-13. This is a misinterpretation of *Burdick*. Under *Burdick*, a court, when determining the constitutionality of an election law, should look to the "character and magnitude" of the restriction on speech and not its classification. 504 U.S. at 434 (citation omitted). Thus the use of labels such as content-based and viewpoint-based does not effect the analysis. What effects the analysis is the amount of speech restricted, an assessment the Eighth Circuit failed to make.

to the detriment of its analysis concerning Missouri's Article VIII. In *Gravel*, this Court acknowledged that "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats *from the Executive Branch*. It thus protects Members *against prosecutions* that directly impinge upon or threaten the legislative process." *Id.* at 616 (emphasis added).[24] In other words, the Speech and Debate Clause was designed to keep Congress people from being criminally prosecuted for the statements they make on the floor of Congress. *See U.S. v. Helstoski*, 442 U.S. 477, 488 (1979) ("the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts"). Of course, the protections of the Speech and Debate Clause extend to civil prosecutions as well. *U.S. v. Johnson*, 337 F.2d 180, 190 (4th Cir. 1964), *aff'd.*, 383 U.S. 169 (1966). But the information placed on the ballot by Missourians pursuant to the terms of Article VIII is not the constitutional equivalent of a prohibited criminal or civil prosecution or feared executive action. It is, rather, protected public commentary on the behavior of congressional candidates. The Speech and Debate Clause was never intended to insulate politicians from the political consequences of their behavior imposed by their constituents.

By the misuse of ellipses, the appellate court's rationale compels a conclusion that the Speech and Debate Clause prohibits anyone from commenting on a Senator or Representative's actions while on the floor of Congress. The Eighth Circuit ignored the purpose of the Speech and Debate Clause when reaching its conclusion, i.e. to allow Senators and Representatives to debate the issues of the day without fear of prosecution by the Executive Branch. *Gravel*, 408 U.S. at 616. Article VIII neither involves any real discretionary action on the part of a member of the Executive Branch, nor does it involve a prosecution. All it involves is the comment by the people on the behavior of a candidate for Congress. And that is not only constitutional, it is commendable.

---

[24] The underline indicates that portion of this Court's language the Eighth Circuit omitted from its rendition of this Court's holding. App. A15.

While the Eighth Circuit was correct in noting that Article VIII did involve some executive action, the executive action at issue is merely ministerial. It is the Secretary of State who places the information on the ballot. But the people have given the Secretary specific guidelines that she must follow when making the decision whether to place the information on the ballot. The Secretary must place ballot information next to an incumbent candidate's name if, and only if, the candidate meets one of criteria specifically outlined in Article VIII, § 17(2)(a-g); or if, and only if, a non-incumbent candidate refuses to pledge to support term limits. Mo. Const. art. VIII, § 18, cl. 1. In neither case is the Secretary afforded discretion in making her decision. If a candidate fails to follow the instructions of the voters or fails to pledge to follow the voter's instructions, then the Secretary must place the corresponding information next to the candidate's name. But if a candidate follows the voters instructions or pledges to follow them, the Secretary is prohibited from placing a comment next to the candidate's name. The Secretary's determination is directly reviewable by the Missouri Supreme Court. Article VIII, § 19. Thus, under Article VIII, the Secretary of State applies the check list the people have given her. No significant executive action is undertaken. Rather, the will of the people is carried out by their agent, the Secretary of State. *See also Matter of Impeachment of Moriarty*, 902 S.W.2d 273, 277 (Mo. 1994) (the vast majority of the duties assumed by the Missouri Secretary of State are ministerial, especially in the area of elections).

Even more fundamentally, Article VIII does not involve a prosecution of members of Congress for their legislative acts. Instead, Article VIII simply involves the people informing themselves about the performance of the candidates for Congress. As Article VIII does not involve any action even remotely approaching a prosecution it does not afoul of the Speech and Debate Clause, which "was designed to preclude prosecution of Members for legislative acts." *Helstoski*, 442 U.S. at 488.

Despite this, the Eighth Circuit found Article VIII to violate the Speech and Debate Clause. This ruling was in error. It was an error that other courts have already committed, that deprives the

people of their voice in government and that only will be corrected if this Court grants the petition for a writ of certiorari.

CONCLUSION

The Eighth Circuit reports that nine states, including Missouri, passed instruct and inform provisions at the November 1996 election. App. A2, n.3. Of those nine, courts have erroneously found the provisions of seven states constitutionally infirm. There are few remaining opportunities for the Court to correct the flaws inherent in these cases; flaws that chill the public's right to communicate and misconstrue the Constitution.

For this reason, along with those stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. McADAMS
Chief Counsel for Litigation
Counsel of Record
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

November, 1999

APPENDIX

INDEX TO APPENDIX

APPENDIX A

Eighth Circuit Court of Appeals' Opinion, August 31, 1999 ..... A1

APPENDIX B

United States District Court's Order Granting Plaintiff's Motion for Summary Judgment, February 18, 1998 ..... A27

APPENDIX C

United States District Court's Order Granting "Defendant's Motion to Dismiss for Failure to State a Claim" as to Count IV of Plaintiff's First Amended Complaint and Denying "Defendant's Motion to Dismiss for Failure to State a Claim" as to Counts I, II, III and V of Plaintiff's First Amended Complaint, January 29, 1998 ..... A36

APPENDIX D

United States District Court's Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, January 15, 1998 ..... A64

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1494

Donald James Gralike,
Plaintiff-Appellee,
Mike Harman,
Intervenor on Appeal,
v.
Rebecca McDowell Cook,
Defendant-Appellant.

Professor Kris W. Kobach,
Amicus on Behalf of Appellant.
League of Women Voters of the United States;
League of Women Voters of Missouri,
Amici on Behalf of Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 16, 1998
Filed: August 31, 1999

Before McMILLIAN, FLOYD R. GIBSON and HANSEN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellant Rebecca McDowell Cook, in her official capacity as Secretary of State of the State of Missouri, appeals from a final order entered in the United States District Court[1] for the Western District of Missouri granting summary judgment in favor of appellee Donald James Gralike, and invalidating as unconstitutional the 1996 Missouri ballot initiative concerning term limits for

---

[1]The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

members of the United States Congress, codified at Article VIII, Sections 15-22 of the Missouri Constitution.[2] *See Gralike v. Cook*, 996 F. Supp. 917 (W.D. Mo. 1998) (*Gralike III*). For reversal, Cook argues that the district court erred in granting summary judgment for appellee because the amendment does not violate the First Amendment or Articles I or V of the United States Constitution. For the reasons discussed below, we affirm the judgment of the district court.

Jurisdiction in the district court was proper based upon 28 U.S.C. §§ 1331, 1343. Jurisdiction on appeal is proper based upon 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

I. BACKGROUND

In November 1996 the voters of Missouri passed an amendment to Article VIII of the Missouri Constitution (hereinafter "Missouri Amendment" or "Amendment") to limit the number of terms any individual may serve in the United States Congress. The Amendment seeks to limit congressional service to three terms in the House of Representatives and two terms in the Senate.[3] *See*

---

[2]In this order, the District Court referred to its January 29, 1998 order, 996 F. Supp. 901 (W.D. Mo. 1998), for the legal analysis supporting its decision that the amendment was unconstitutional on Article I, Free Speech, Article V, and vagueness grounds.

[3]Similar initiatives were on the ballot in thirteen other states in November 1996. In Alaska, Arkansas, Colorado, Idaho, Maine, Nebraska, Nevada and South Dakota voters approved the initiatives, while in Montana, North Dakota, Oregon, Washington, and Wyoming they rejected them. *See* Robert Pear, *The 1996 Elections: The States--The Initiatives*, N.Y. Times, Nov. 7, 1996, at B7.

As of the writing of this opinion, the initiatives in Arkansas, Colorado, Idaho, Maine, Nebraska, South Dakota, and Missouri have been invalidated in federal and state courts on various state and federal constitutional grounds. *See Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (Nebraska initiative invalidated on Article V and right to vote grounds); *Barker v. Hazeltine*, 3 F. Supp.2d 1088 (D.S.D. 1998) (invalidated on Article V, First Amendment, Speech and Debate, and Due Process grounds); *League of Women Voters of Maine v. Gwadosky*, 966

MO. CONST. Art. VIII, § 16. To achieve this goal, the Missouri Amendment orders members of Missouri's congressional delegation to use their authority to amend the United States Constitution to impose term limits in § 16 on Congressional service. *See id.* § 17.

If a Missouri Representative or Senator fails to comply with this order, the Missouri Amendment dictates that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed next to his or her name on all ballots during the next election. *Id.* The Missouri Amendment defines a failure to comply with the instructions as: (1) failure to vote in favor of a term limit amendment conforming with § 16; (2) failure to second it if a second is lacking; (3) failure to propose or otherwise bring to a vote a term limit amendment conforming with § 16; (4) failure to vote favorably on measures to bring such an amendment before committee; (5) failure to vote against all measure to delay, table, or otherwise prevent a vote by the full body; (6) failure to vote against amendments allowing longer terms of Congressional service than § 16 allows; (7) sponsoring or cosponsoring an amendment with longer terms than those in § 16; and (8) failure to ensure that all votes on term limits are recorded and available to the public. *See id.*

The Missouri Amendment requires non-incumbent candidates to take a pledge to use their authority to amend the United States Constitution to impose the term limits in § 16 if elected. It orders that those who do not take the pledge have the

---

F. Supp. 52 (D.Me. 1997) (invalidated on Article V grounds); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996) (a pre-election challenge, initiative invalidated on Article V grounds); *Morrissey v. Colorado*, 951 P.2d 911 (Colo. 1998) (invalidated on Article V grounds); *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (invalidated on First Amendment, Speech and Debate Clause, and state constitutional grounds); *In re: Initiative Petition No. 364, State Question No. 673*, 930 S.W.2d 186 (Okla. 1996) (invalidated on Article V and state constitutional grounds).

Yet another similar initiative was passed in California in June 1998. The Supreme Court of California invalidated it on Article V and state initiative law grounds. *See Bramberg v. Jones*, 20 Cal.4th 1045, 1054-64 (Cal. 1999).

label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed next to their names on the ballot. *Id.* § 18. To avoid being labeled on the ballot, non-incumbent candidates must take the following pledge:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

§ 18(3).

For both incumbent and non-incumbent candidates, the Missouri Amendment requires the Secretary of State to decide whether a label will be printed on the ballot and to consider public comment in making that determination. *See id.* § 19 (1-4). It allows individual voters to appeal the Secretary of State's decision not to print the label by a candidate's name directly to the Missouri Supreme Court, in which case the Secretary of State must produce clear and convincing evidence that the candidate conformed with the initiative or took the pledge. It also permits a candidate, whom the Secretary of State decides shall have the label appear next to his or her name on the ballot, to appeal this decision to the Missouri Supreme Court, in which case the candidate must produce clear and convincing evidence why the label should not be printed on the ballot. *See id.* § 19 (5-6). In addition, the Missouri Amendment automatically repeals itself if and when the United States Constitution is amended to conform with the § 16 term limits. *See id.* § 20. It also grants the Missouri Supreme Court original jurisdiction to hear challenges to the Amendment. *See id.* § 21. Finally, it contains a severability clause. *See id.* § 22.

Soon after its passage, appellee initiated this action in federal district court challenging the Missouri Amendment on several federal constitutional grounds. Appellee is not currently a member of the Missouri congressional delegation, but he was a

candidate for the third district Congressional seat in 1998 and has issued a declaration of his intent to run for the same seat in 2000. The district court issued three memorandum orders addressing different motions by the parties. In the first order, the district court denied in part and granted in part appellant's motion to dismiss, finding that appellee did have standing to sue, did meet the requirements for injunctive relief, that appellant was not protected by Eleventh Amendment immunity, that the court need not abstain from judgment since there were no unanswered questions of state law, and that the court need not certify questions of federal law to the Missouri Supreme Court since that court has held that it lacks jurisdiction over such questions.[4] *See Gralike v. Cook*, 996 F. Supp. 889 (W.D. Mo. 1998) (*Gralike I*). In its second order, the district court granted in part and denied in part appellant's motion to dismiss for failure to state a claim; it denied appellant's motion to dismiss appellee's claims that the Missouri Amendment violates Article I, Article V, and the First and Fourteenth Amendments of the United States Constitution, but granted her motion to dismiss appellee's claim that § 21 of the Missouri Amendment violates the Supremacy Clause of the United States Constitution. *See id.*, 996 F. Supp. 901 (W.D. Mo. 1998) (*Gralike II*). In its final order in this case, the district court granted appellee's motion for summary judgment on his Article I, Article V, and First Amendment Claims; the district court did not reach plaintiff-appellee's Due Process vagueness claim because it determined that the other three claims were sufficient to dispose of the case. *See id.*, 996 F. Supp. 917 (W.D. Mo. 1998) (*Gralike III*). The district court, in *Gralike III*, relied upon its earlier order in *Gralike II* for the analysis supporting its decision to grant summary judgment for plaintiff-appellee. Judgment was entered for appellee, and appellant timely appealed.

---

[4]The District Court cited *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 108-09 (1990) (discussing the Missouri Supreme Court's order in *Zeman v. V.F. Factory Outlet, Inc.*, No. 72613 (Mo. July 13, 1990) (refusing to accept questions certified by federal courts)). *See Gralike v. Cook*, 996 F. Supp. 889, 901 (W.D. Mo. 1998) (*Gralike I*).

II. DISCUSSION

We review decisions to grant summary judgment de novo, reviewing the facts in the light most favorable to the non-moving party. *See Barnhart v. UNUM Life Insurance Co. of America*, No. 98-3350, Slip Op. at 7 (8th Cir. May 28, 1999). We will affirm a grant of summary judgment if, viewed in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See, e.g., Hughes v. Ortho Pharmaceutical Corp.*, No. 98-2218, Slip Op. at 4-5 (8th Cir. May 27, 1999).

A. FIRST AMENDMENT

Appellant argues that the district court erred in holding that the Missouri Amendment violates the First Amendment guarantee of free speech. First, she argues that, because the Missouri Amendment imposes no sanction on candidates for United States Congress for failure to speak, the district court erred in concluding that the Missouri Amendment compels or coerces candidates to speak. Second, she argues that the district court should not have analyzed the Missouri Amendment under strict scrutiny review, but rather should have balanced candidates' right to keep their views on term limits secret with the electorate's right to know the views of candidates. Furthermore, she points out, the Amendment was the result of a popular election, and the courts should be especially careful when considering legislation passed by direct democracy. We agree with the district court's well-reasoned analysis, and reject appellant's arguments.

1. Compelled Speech

It is well established that the First Amendment to the United States Constitution bars not only state action which restricts free expression but also state action which compels individuals to speak or express a certain point of view. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (*Wooley*); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (*Barnette*); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)

(*Miami Herald*); *cf. Scope Pictures v. City of Kansas City*, 140 F.3d 1201 (8th Cir. 1998); *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995). Moreover, "[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in the public context." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). We hold that the Missouri Amendment is an impermissible attempt by the State of Missouri to compel candidates to express a point of view on term limits. *Accord Barker v. Letellier*, 3 F. Supp. 1088, 1096 (D.S.D. 1998) (*Barker*) (invalidating a nearly identical term limit initiative passed in South Dakota on First Amendment grounds, in part); *Simpson v. Cenarrusa*, 944 P.2d 1372, 1375-76 (Idaho 1997) (*Simpson*) (invalidating similar term limit initiative in Idaho on First Amendment grounds, among other grounds).

In *Wooley*, the Supreme Court invalidated the conviction of a New Hampshire couple who covered the state motto "Live Free or Die" on their license plate, concluding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714; *see also Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Since *Wooley*, the Supreme Court has reaffirmed the prohibition on compelled speech and refined it to apply to cases in which the government orders certain types of speech or speech about certain topics. For example, in *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 786 (1988), the Court invalidated on First Amendment grounds a North Carolina law which, among other things, required professional fund raisers, before soliciting donations, to disclose what portion of donations they turned over to the charities for which they solicited in the preceding twelve months. The Court concluded that the state law violated the First Amendment prohibition on state-compelled speech because "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it . . . . To this end, the government . . .

may not substitute its judgment as to how best to speak for that of speakers and listeners . . . ." *Id.* at 790-91; *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 14-16 (1986) (*Pacific Gas*) ("the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold . . . . [T]he choice to speak includes within it the choice of what not to say . . . .").

The Missouri Amendment compels candidates to speak about term limits. First, it attempts to force candidates to speak in favor of term limits by threatening them with the ballot label if they fail to do so. Second, if a candidate refuses to speak in favor of term limits, the label on the ballot forces him or her to speak in opposition to the Amendment by noting that he or she failed to follow the voters' wishes. Either way, the Missouri Amendment does not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak. First, the Missouri Amendment selects the topic for public debate: term limits. Second, it chooses an approved position: favoring term limits. Third, it provides the actual words which non-incumbent candidates shall speak: the pledge. Finally, in the event its attempts to compel speech in favor of term limits fail, the Missouri Amendment provides a mechanism to compel candidates to speak in opposition: the ballot labels.

Appellant attempts to distinguish the Missouri Amendment from other compelled speech cases by arguing that the Missouri Amendment does not compel speech because it imposes no criminal or monetary sanction for refusing to speak. Rather, the only possible sanction the Missouri Amendment could impose, appellant argues, is the exposure of candidates' views and/or record on term limits. We disagree. As a threshold matter, we note that the concept of compelled speech has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction. *See, e.g., Miami Herald*, 418 U.S. at 258 ("Even if a newspaper would face no additional costs to comply . . . the Florida statute ([compelling speech] fails to clear the barriers of the First Amendment . . . ."). Nevertheless,

we believe that the Missouri Amendment in fact threatens a penalty that is serious enough to compel candidates to speak--the potential political damage of the ballot labels. *See Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999) (*Moore*); *accord Barker*, 3 F. Supp. 2d at 1094-95.

Contrary to appellant's contentions that the labels only provide information about the candidates' views, the labels do far more than advise voters of a candidates' opposition to term limits.[5] The labels are phrased in such a way they are likely to give (and we believe calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. *See Moore*, 169 F.3d at 1125; *accord Barker*, 3 F. Supp. 2d at 1094-95; *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52, 59-61 (D.Me. 1997) (*Gwadosky*); *Donovan v. Priest*, 326 Ark. 353, 370 (Ark. 1996) (*Donovan*); *Morrissey v. State*, 951 P.2d 911, 916 (Colo. 1998) (*Morrissey*). The non-incumbent label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," in light of the preamble and § 16 of the Amendment which state that the people of Missouri desire term limits, indicates that a candidate so labeled refused to promise to do the people's bidding. The incumbent label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" indicates that, during the preceding term, the candidate failed to act in accordance with his or her constituents' wishes. Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress.

The pejorative nature of the labels is heightened by the fact that there are no labels for candidates who take the pledge or comply with the mandates of § 17 while in office. The only "information" the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires.

---

[5]Thus the question of whether the label is damaging does not turn so much on the impact of voter reaction to the fact that a candidate opposes or supports term limits, as appellant suggests, but more so on the language in the label that advises the voters of the candidate's purported opposition.

Furthermore, the labels are particularly harmful because they appear on the ballot, an official document produced by the state.[6] Thus, the labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that § 17 requires. *Moore*, 169 F.3d at 1125 ("[the] ballot labels effectively place the state's official stamp of disapproval on . . . [candidates] whom the state disfavors because of their views on a single political issue . . ."; *accord Barker*, 3 F. Supp. 2d at 1094, *Gwadosky*, 966 F. Supp. at 61; *Donovan*, 326 Ark. at 370 ("[the labels] are equivalent to an officially sanctioned recommendation by the State . . . not to vote for such candidates because they disregarded the instructions and wishes of the voters."). The ballot labels are a serious sanction, which we believe is sufficient to coerce candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot. Moreover, the fact that the label appears on the ballot compels candidates to speak because the labels themselves constitute speech. Once the label is on the ballot, it ascribes a point of view to the labeled candidate.

Arguing that the First Amendment does not insulate candidates from the electorate, appellant points out that individuals become subject to the Missouri Amendment only if they chose to run for office. However, "[a] political candidate does not lose the protection of the First Amendment when he [or she] declares himself [or herself] for public office." *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). An individual's choice to serve the public by seeking congressional office does not grant the state license to restrict or compel his or her speech. On the contrary, speech restrictions are particularly destructive in the political arena, where the importance of free exchange of ideas and information--a vital aspect of our democratic system--is at its zenith. *See id.* Furthermore, "[t]he identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas*, 475 U.S.

---

[6]Moreover, the labels appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label.

at 8. Thus we reject appellee's suggestion that candidates for public office are afforded diminished First Amendment protections.

2. Application of Strict Scrutiny

Appellant also argues that the district court erred in applying strict scrutiny analysis to determine the constitutionality of the Missouri Amendment. She contends that instead the district court should have applied a "balancing test" and upheld the Amendment since the electorate's right to know candidates' views on term limits outweighs that of candidates to remain silent on the issue. Appellee's Brief at 19 (hereinafter "App. Br."). We disagree.

The District Court correctly determined that the Missouri Amendment is subject to strict scrutiny review. First, as discussed above, the Amendment burdens candidates' right to free expression by compelling them to state or act in such a way as to portray a position on the § 16 term limits proposal. This is an impermissible restriction on core political speech, which subjects the Amendment to strict scrutiny review. *See Meyer v. Grant*, 486 U.S. 414, 425 (1988). However, even assuming for purposes of analysis that the Missouri Amendment did not compel political speech, strict scrutiny review is warranted because the Amendment is a content-based, viewpoint-specific restriction on candidates' right to free speech. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (*Burson*) ("[A] facially content-based restriction on political speech in a public forum . . . must be subjected to exacting scrutiny); *see also Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994).

The Missouri Amendment is content-based because it addresses the issue of term limits, completely ignoring all other issues. In addition, it is content-based because it compels candidates to speak about the issue of term limits, which they might not do absent state action. *See Riley*, 487 U.S. at 795 (state mandate of "speech that the speaker would not otherwise make necessarily alters the content of the speech"). Furthermore, the Missouri Amendment is viewpoint-specific because the labeling provisions single out individual candidates for punishment based

only on their opposition-actual or ascribed-to term limits.[7] The Missouri Amendment only labels those who, according to the Secretary of State, oppose the Amendment's term limits proposal, and does nothing to those who pledge to support it. As such, the Missouri Amendment is a state-imposed, viewpoint specific restriction on candidates' speech which triggers strict scrutiny review. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("The general principle that has emerged . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-36 (1980); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)).

We hold that the district court correctly determined that the Missouri Amendment should be subject to strict scrutiny review.[8]

---

[7]The point of view the labels ascribe to candidates may not even be accurate. The Missouri Amendment assigns a label to non-incumbents who fail to pledge and to incumbents who fail to do one of the seven enumerated actions, regardless of whether the candidates in fact oppose term limits. For example, a candidate who believed that terms should be limited to 12 years in the House rather than the six years the Amendment requires would receive the label even though he or she actually supports term limits in general. An incumbent candidate who supports term limits but failed to vote for a proposed amendment because it was linked to unfavorable legislation, for instance, could also be labeled on the ballot. Regardless of a candidate's opinion about term limits in general, if the candidate does not support the specific limit prescribed by the Missouri Amendment or if he or she does not see it fit to pursue the amendment process at any cost, he or she will be branded as an opponent to the Missouri Amendment and to the wishes of the voters of Missouri. Such ascriptions of viewpoint are precisely the type of state-imposed speech from which individuals are protected by the First Amendment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977).

[8]Appellant urges us to determine the appropriate level of scrutiny by applying the Supreme Court's reasoning in *Burdick v. Takushi*, 504 U.S. 428 (1992) (*Burdick*). *Burdick* was a voting rights case brought by an individual voter challenging Hawaii's absolute ban on write-in voting. The plaintiff alleged that the ban violated his First and Fourteenth Amendment rights. The Court advocated

To survive strict scrutiny review, appellant must prove that the Missouri Amendment is narrowly tailored to achieve a compelling government interest. *See Burson*, 505 U.S. at 198 ("The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'") (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 36, 45 (1983)); *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996); *see also Riley*, 487 U.S. at 801 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Appellant maintains that the Missouri Amendment ensures the electorate's right to know candidates' views. We construe this to mean that voter education is the compelling state interest the Missouri Amendment is meant to achieve. While we agree that an informed electorate is important in our democratic system of government, we hold that the Missouri Amendment fails strict scrutiny review because it is not narrowly tailored to achieve the goal of voter education. First, the Missouri Amendment only provides information about candidates views on term limits, neglecting every other issue. Although the voters of Missouri obviously feel strongly about term limits, we believe that a state measure that informs voters only of candidates' views on term limits does not ensure an informed electorate. Second, the

---

an inquiry into the degree of state interference with First and Fourteenth Amendment rights to determine the level of scrutiny to apply, stating that state election regulations which severely restrict those rights must be narrowly tailored to achieve a compelling state interest but that regulations that impose only "reasonable, non-discriminatory restrictions" are generally justified with important state interests. *See id.* at 434.

Although the present case differs from *Burdick* in significant regards, we believe that applying the *Burdick* test also mandates strict scrutiny. The Missouri Amendment is not a reasonable, nondiscriminatory restriction on candidates' First and Fourteenth Amendment rights, rather it is a content-based and viewpoint-specific interference with candidates' right to free speech. As such, *Burdick* would require a narrowly tailored regulation to achieve a compelling state interest.

Missouri Amendment is not narrowly tailored to achieve even the more limited goal of informing voters of candidates' views on term limits, because it can falsely identify candidates. For example, the Amendment could require the placement of a ballot label next to the name of a term limits supporter who failed to comply with an aspect of § 17(2). *See also* supra note 7. Finally, there are less restrictive means to promote voter education, which indicates that the Missouri Amendment is not narrowly tailored. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988). For example, Missouri could institute voluntary programs, such as debates or voter information guides, to provide information about candidates' views on term limits and other important issues. Such programs advance the State's interest in informing voters without compelling candidates to speak or restricting their right not to speak.

Since appellant failed to prove that the labeling provisions of the Missouri Amendment are narrowly tailored to achieve a compelling state interest, she has failed to justify its infringement on candidates' right to free speech. The label provisions of the Missouri Amendment are barred by the First Amendment as applicable to the states through the Fourteenth Amendment.

B. SPEECH AND DEBATE CLAUSE[9]

A related issue, which applies more appropriately to incumbent candidates, is whether the Missouri Amendment violates Article I, Section 6, Clause 1 of the United States Constitution--the

---

[9]Although the district court did not address this issue, we believe it is necessary to demonstrate why the Missouri Amendment is invalid as applied to incumbent candidates. Since the situation of incumbent candidates is somewhat different than that of non-incumbent candidates, the First Amendment issues discussed in Section IIA do not apply as squarely to incumbent candidates. As such we exercise our discretion to affirm the judgment on this ground, although it was not considered by the district court. *See United States v. Sager*, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984) ("We review judgments, not opinions, and we may affirm on any ground supported by the record, whether or not that ground was urged below or passed on by the district court."); *see also Wisdom v. First Midwest Bank*, 167 F.3d 402, 406 (8th Cir. 1999) (quoting *Stevens v. Redwing*, 146 F.3d 538, 543 (8th Cir. 1998)).

Speech and Debate Clause, which states, in relevant part: ". . . for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The Missouri Amendment contravenes this guarantee because it establishes a regime in which a state officer--the secretary of state--is permitted to judge and punish members of Congress for their legislative actions or positions. *Accord Barker*, 3 F. Supp. at 1096; *Simpson*, 944 P.2d at 1375.

The Missouri Amendment specifically vests in the Secretary of State of Missouri the responsibility to determine when the ballot label shall appear next to the name of an incumbent candidate. *See* MO. CONST. Art. VIII, § 19. In so doing, she is to accept and consider public comments. *See id.* at § 19(3). As we discussed above, the ballot label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" is a pejorative label with politically damaging ramifications, which amounts to punishment. Thus, the Missouri Amendment establishes a system by which Senators and Representatives are questioned about and can be punished for speech, debate, and actions in Congress. This system contradicts the protections of the Speech and Debate clause, which is intended to allow Senators and Representatives to speak and vote their conscience without fear of retribution. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats . . . that directly impinge upon or threaten the legislative process.").

The portions of the Missouri Amendment dealing with labeling incumbent candidates based on their legislative speech and actions violate the Speech and Debate clause. *Accord Barker*, 3 F. Supp. at 1096; *Simpson*, 944 P.2d at 1375.

C. QUALIFICATIONS CLAUSE

Appellant next contends that the district court erred in concluding that the Missouri Amendment constitutes an impermissible qualification for candidacy for the United States

Congress in violation of the Qualifications Clause, Article I of the United States Constitution. Appellant argues that the Missouri Amendment does no more than provide information about candidates and does not constitute a qualification within the meaning of Article I. We disagree.

We believe that Qualifications Clause issues raised in this case were addressed by the Supreme Court in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). In that case the Court held that an amendment to the Arkansas Constitution, which banned the names of incumbents who had served more than two terms in the United States Senate or three terms in the United States House of Representatives from appearing on the ballot, established an impermissible additional qualification for candidacy for Congress. *See id.* at 829-30. After conducting a thorough historical review, the Court determined that neither the Framers, the constructs of our democratic society, the text of the Constitution itself, nor past Congressional action supported the contention that states may impose additional or different qualifications than those set out in the Qualifications Clause. *See id.* at 827. Rather, the Court stated, any state authority to set qualifications for Congress was abrogated by the ratification of the Constitution, and the sole source of qualifications for Congressional office is contained in Article I. *See id.* at 801. Thus, any attempt by a state to alter or add to these qualifications is clearly proscribed by the Constitution. [10]

---

[10]In *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (*U.S. Term Limits*) the Supreme Court pointed out, there is unanimity among courts which have considered whether states can add to or change Article I qualifications. The Court cited a litany of cases which struck state-initiated attempts to alter Article I qualifications:

> *Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *Eckwall v. Stadelman*, 146 Ore. 439, 446, 30 P.2d 1037, 1040 (1934); *Stockton v. McFarland*, 56 Ariz. 138, 144, 106 P.2d 328, 330 (1940); *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948); *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (D. N. M. 1972); *Stack v. Adams*, 315 F. Supp. 1295, 1297-1298 (N.D.Fla. 1970); *Buckingham v. State*, 42 Del. 405, 35 A.2d 903, 905 (1944); *Stumpf v. Lau*, 108 Nev. 826, 830, 839 P.2d 120, 123 (1992); *Danielson v. Fitzsimmons*, 232 Minn. 149, 151, 44 N.W.2d 484, 486 (1950); *In re Opinion of Judges*, 79 S.D. 585, 587, 116 N.W.2d 233, 234 (1962). Courts have struck down state-imposed qualifications in the form of term limits, *see, e.g., Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994); *Stumpf v. Lau*, 108 Nev. at 830, 839 P.2d at 123, district residency requirements, *see, e.g., Hellmann v. Collier*, 217 Md. 93, 100, 141 A.2d 908, 911 (1958); *Dillon v. Fiorina*, 340 F. Supp. at 731; *Exon v. Tiemann*, 279, F. Supp. 609, 613 (Neb. 1968); *State ex rel. Chavez v. Evans*, 79 N.M. 578, 581, 446 P.2d 445, 448 (1968) (per curiam), loyalty oath requirements, *see, e.g., Shub v. Simpson*, 196 Md. 177, 199, 76 A.2d 332, 341, *appeal dism'd*, 340 U.S. 881 (1950); *In re O'Connor*, 173 Misc. 419, 421, 17 N.Y.S.2d 758, 760 (super. Ct. 1940), [**34] and restrictions on those convicted of felonies, *see, e.g., Application of Ferguson*, 57 Misc. 2d 1041, 1043, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968); *Danielson v. Fitzsimmons*, 232 Minn. at 151, 44 N.W.2d at 486; *State ex rel. Eaton v. Schmahl*, 140 Minn. 219, 220, 167 N.W. 481 (1918) (per curiam).
>
> *U.S. Term Limits*, 514 U.S. at 798-99.

Furthermore, the Court found that indirect attempts to modify Congressional qualifications were equally infirm. Although the Arkansas Amendment did not prohibit incumbents from service in Congress, the Court rejected the petitioner's contention that the Arkansas Amendment did not impose an impermissible qualification because incumbents could still be elected as write-in candidates. *See id.* at 830-31. The Court determined that states cannot achieve by indirect means what is constitutionally prohibited by direct means. *See id.* at 829. To identify impermissible indirect attempts to alter qualifications for Congress, the Court devised a two-part test: "[]a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836.

The Missouri Amendment fails *U.S. Term Limit*'s test. First, the Amendment specifically targets a distinct class of candidates--those who oppose term limits, refuse to take the term

limits pledge, or fail to do one or more of the actions prescribed by the Amendment while serving in Congress. This class of candidates is singled out on the ballot with the damaging labels. The label provisions will have the likely effect of coercing candidates to support the term limits mandate or removing candidates who fail to do so by persuading voters not to elect them. As we discussed above, the ballot labels cast doubt on labeled candidates' ability to represent constituents, since the labels state that labeled candidates ignore their constituents' wishes. As such, the Missouri Amendment is likely to handicap labeled candidates' ability to be elected.

Second, as discussed above, the Missouri Amendment has the sole, expressed purpose of adding the qualification to congressional service that candidates must have served fewer than three terms in the House or two terms in the Senate. Sections 15 and 16 of the Missouri Amendment state that the people of Missouri seek to limit the number of terms of service in Congress to three in the House and two in the Senate. To attain this goal, the Missouri Amendment requires members of the Missouri congressional delegation to pursue the Article V amendment process, and it enforces this mandate with the threat of the ballot labels. *See* MO. CONST. Art. VIII, § 17. Thus, adding the term limit qualification is the sole purpose of the Missouri Amendment. The fact that the Missouri Amendment seeks to do so by compelling members of Congress from Missouri to initiate, pursue, and support the Article V amendment process does not change the analysis under *U.S. Term Limits*, as it is still an indirect attempt to add a qualification to those listed in the Qualifications Clause. Since the Missouri Amendment seeks to impose an additional qualification for candidacy for Congress and does so in a manner which is highly likely to handicap term limit opponents and other

labeled candidates, it fails the *U.S. Term Limits* test.[11] *See* 504 U.S. at 829.

D. ARTICLE V

Lastly, appellant argues that the district court erred in holding that the Missouri Amendment violates Article V of the United States Constitution, which sets out the process through which the Constitution may be amended. She contends that the Missouri Amendment does not alter the Article V process. We disagree.

Article V of the United States Constitution sets forth the two processes through which the United States Constitution may be amended. Article V states in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments

---

[11]Appellant attempts to demonstrate that the Supreme Court has rejected Qualifications Clause challenges to State election practices, citing *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (*Tashjian*). However, appellant's attempts to draw parallels between *Tashjian* and the Missouri Amendment fail. *Tashjian* dealt with the effect of the Qualifications Clause on the qualification of independent voters to participate in the Connecticut Republican Party's primary. The Court stated that the Framers sought to prevent the disqualification of state voters from *voting* in federal elections through the Qualifications Clause. *See id.* at 228.

Appellant would have us extend *Tashjian* to allow state-imposed qualifications as long as they do not disqualify state residents from *running for* Congress; we decline to do so. *Tashjian* dealt with the issue of qualification to participate in the political process as voters. The Supreme Court held that the qualifications clause did not demand symmetrical qualifications for voters in state and federal elections. The Missouri Amendment, however, does not deal with the qualification of Missouri voters to vote in federal elections, but their qualification as candidates in the election.

Furthermore, appellant's citation to *Tashjian* to support the argument that only direct disqualifications violate the Qualifications Clause has already been rejected by the Supreme Court in *U.S. Term Limits v. Thornton*. *U.S. Term Limits*, 514 U.S. at 829.

> to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. Art. V. Article V specifically delegates the amendment process to legislative bodies, not the voters.

Supreme Court precedent supports the conclusion that the people have a limited, third-party role in the amendment process. In invalidating an Ohio constitutional amendment which required ratification of the Eighteenth Amendment by popular referendum, the Court held that the ratification of a constitutional amendment was a federal function derived from Article V, which delineates the sole methods for ratification. *See Hawke v. Smith*, 253 U.S. 221, 230 (1920). In *Leser v. Garnett*, 258 U.S. 130, 137 (1922), the Court held that the ratification of the Nineteenth Amendment was not subject to state-imposed restrictions on the amendment process. The Court again determined that state legislatures ratifying constitutional amendments assume a federal function, which "transcends any limitations sought to be imposed by the people of a State." *Id.* Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions.

More recently, two state courts were confronted with voter-initiated attempts to direct the Article V amendment process. The Supreme Courts of California and Montana invalidated, on Article V grounds, voter initiatives that compelled the California and Montana State legislatures to apply to Congress to call a constitutional convention to consider a balanced budget amendment. *See AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984) (*Eu*); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984)

(*Waltermire*). In each case, the initiative required State legislators to continue in session without pay if they did not pass the necessary petitions within a specified period. Both courts determined that such voter-imposed restrictions on legislators' ability to deliberate the issues independently violated Article V. *See Eu*, 686 P.2d at 706; *Waltermire*, 691 P.2d at 830.

Appellant maintains that Article V does not prohibit the electorate from directing elected officials to amend the Constitution. He relies principally on *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), to support this contention. In that case then-Justice Rehnquist, sitting as Circuit Justice, denied an injunction against a non-binding referendum in Nevada about the Equal Rights Amendment. Justice Rehnquist reasoned that the referendum did not alter the Article V process because it only served to advise legislators of the people's wishes and legislators were free to disregard it. *See id.* at 1388.

However, the Missouri Amendment is far more than an advisory, non-binding show of voters' opinion on term limits. *See, e.g., Moore*, 169 F.3d at 1124; *Barker*, 3 F. Supp. 2d at 1093; *Gwadosky*, 966 F. Supp. at 57; *Donovan*, 931 S.W.2d at 367; *Petition No. 364*, 930 P.2d at 192-93. *But see Simpson*, 944 P.2d at 613 (holding that without the ballot labels, the term limit initiative is non-binding and thus permissible under *Kimble*). By its own terms, the Missouri Amendment requires Senators and Representatives from Missouri to initiate and support the Article V process: "We, the Voters of Missouri, hereby *instruct* each member of our congressional delegation to use all of his or her delegated powers to pass the Congressional Term Limits Amendment." MO. CONST. Art. VIII, § 17(1) (emphasis added); *see also Moore*, 169 F.3d at 1124 (interpreting Nebraska term limits initiative to bind members of Congress to "'proceed on a precise and inflexible course of action'") (quoting *Morrissey*, 951 P.2d at 916). Furthermore, the Missouri Amendment seeks to coerce members of Congress to comply with this mandate by threatening them with the politically-damaging ballot labels if they fail to do so. Thus, unlike the Nevada legislators in *Kimble*, members of Missouri's congressional delegation are not free to disregard the instruction

embodied in the Amendment. *See, e.g., Moore*, 169 F.3d at 1124; *Barker*, 3 F. Supp. 2d at 1093; *Gwadosky*, 966 F. Supp. at 57; *Donovan*, 931 S.W.2d at 367; *Petition No. 364*, 930 P.2d at 192-93. *But see Simpson*, 944 P.2d at 613.

We cannot accept appellant's argument that the Missouri Amendment does not alter the Article V process. Voter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V. As discussed above, the Missouri Amendment's ballot labels constitute such an attempt by the voters to directly influence the Article V process by directing Senators and Representatives from Missouri to support and pursue the proposal and ratification of a term limits amendment to the United States Constitution.

III. CONCLUSION

The record, viewed in the light most favorable to appellant, reveals no genuine issue of material fact and that appellee is entitled to judgment as a matter of law because the Missouri Amendment violates the First Amendment, the Speech and Debate Clause, the Qualifications Clause, and Article V of the United States Constitution. [12]

---

[12] Judge Hansen dissents from our decision to strike the Missouri Amendment in its entirety and argues that, instead, we should sever §§ 17-19 and leave the remainder of the Amendment intact. If we followed Judge Hansen's recommendation, Article VIII of the Missouri Constitution would state that the people of Missouri seek to amend the United States Constitution by adding a term limit qualification for Congressional service. Although there would no longer be a State-imposed punishment for candidates who fail to support the proposed term limit, the Missouri Constitution would still contain: (a) a direct attempt by the people to amend the U.S. Constitution and (b) an attempt by the State and people of Missouri to add a qualification to Article I. Because we believe that both these attempts are unconstitutional, we cannot follow Judge Hansen's suggestion, notwithstanding this court's decision in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999).

First, as we noted in Part IID, the people are not to play a direct role in the Article V amendment process. While we agree with Judge Hansen that advisory communication between the people and their elected officials is

Accordingly, we affirm the judgment of the district court.

HANSEN, Circuit Judge, concurring in part and dissenting in part.

I readily concur with Part I of the opinion of the court and those portions of Part II which declare the labeling provisions (§§ 17, 18, and 19) of the Missouri Amendment to be in violation of the Constitution. I write separately, however, specifically to assert my view that §§ 15 and 16 of the Missouri Amendment are severable pursuant to § 22 of the Amendment and are not independently unconstitutional under the court's reasoning in Part II. Because I believe §§ 15 and 16 remain legitimate political expressions of the citizens of Missouri, I must respectfully dissent

---

permitted, we believe that the Missouri Amendment constitutes more than such merely advisory communications, and, as such, is barred by Article V. Assuming for the purposes of analysis that a Circuit Justice opinion for the Ninth Circuit is binding precedent in the Eighth Circuit, we believe that *Kimble* is distinguishable. The referendum in *Kimble* was initiated by the Nevada Legislature and specifically stated that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." 439 U.S. at 1386 (quoting 1977 Nev. Stats., ch. 174, §§ 3, 5). If the Missouri Amendment contained similar language, we would agree with Judge Hansen that it is not coercive. However, in the absence of such language, we believe that the memorialization in the Missouri Constitution of the people's intent to pass a specific amendment to the United States Constitution departs from the expressly advisory, non-binding referendum then-Justice Rehnquist found to be permissible in *Kimble* and comes closer to the direct involvement the Supreme Court disallowed in *Lesser* and *Hawke*. *See* Part IID, above.

Second, as we noted in Part IIC, states cannot constitutionally add to or alter the qualifications for federal office. *See* U.S. Const. Art. I. Thus, §§ 15 and 16 are arguably barred by Article I because they are an attempt by a state to add to or change the qualifications for service in the United States Congress--as opposed to an Article V petition for a Constitutional convention from a state legislature to consider amending the United States Constitution.

Finally, we refuse to sever the Missouri Amendment on jurisprudential grounds, because if we choose to sever §§ 17-19, we must also sever portions of § 16 which are unconstitutional or superfluous in the absence of §§ 17-19. Such micro-management of the Missouri Constitution would entangle this court too much in state law issues. As such, we opt to abstain from such action.

from that portion of the court's opinion and judgment which sweeps away the entirety of the Missouri Amendment.

In *Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999), this court recently held, while striking down several sections of a similar Nebraska term limits amendment, that the section declaring the official position of the citizens of Nebraska to be that their elected officials should enact a term limits amendment was severable and constitutional. The principle established in *Miller v. Moore* is equally applicable to the Missouri amendment at issue in this case. Standing alone, §§ 15 and 16 are a legitimate, nonbinding form of political expression by the citizens of Missouri explaining their support for a specific term limits amendment to the United States Constitution.

The opinion of the court suggests that §§ 15 and 16 standing alone violate Article V and Article I of the federal Constitution because they are, respectively, "a direct attempt by the people to amend the U.S. Constitution" and "an attempt by the State and people of Missouri to add a qualification to Article I." *See supra* at 24 n.12. With respect to the latter, I believe the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I. Once §§ 17 through 19 are struck down, §§ 15 and 16 do not in any way add to or alter the current qualifications for Missouri's congressional delegation, nor do they affect in any way federal election procedures. Furthermore, § 15 could not be more explicit when it states that the purpose of the voter-approved initiative is to "lead to the adoption of the following U.S. Constitutional Amendment." Therefore, I see nothing unconstitutional about these efforts (§§ 15 and 16) by the people of Missouri to secure an amendment to Article I through the Article V process, and nothing in the decision in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), suggests otherwise.

With respect to Article V, the "people" (that is, the citizenry) have more than "a limited, third party role in the amendment process." *See supra* at 21. In fact, "We the People"

have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment *procedures* set out in Article V. However, the people play a crucial, *substantive* role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures. Standing alone, §§ 15 and 16 are nothing more than the people of the State of Missouri exercising their political right to petition their elected representatives to enact a term limits amendment to the Constitution. The only "coercion" involved in this form of political expression is ordinary garden-variety political pressure, which certainly is not prohibited by the Constitution. Nothing in §§ 15 and 16 restricts the formal amendment procedures of Article V, and thus they should not be held to violate the Constitution.

I know of no precedent that prohibits the people of a state from expressing their political views through amendments to their state constitution, even if that expression involves matters of interest to or under the control of federal legislators, so long as the amendment is advisory and does not coerce elected officials into acting in a certain way. *See Kimble v. Swackhamer*, 439 U.S. 1385, 1387-88 (1978) (Rehnquist, Circuit Justice). The court's opinion attempts to distinguish the principle in *Kimble* by arguing that the Missouri Amendment contains no specific language making it clear that it does not bind representatives. Whether the Amendment specifically states that it is nonbinding or not, the effect is the same--it is nonbinding. Once the labeling provisions found in §§ 17 through 19 are struck down, there are no longer any improper penalties imposed on elected officials and there is no longer an enforcement mechanism other than through the basic political process. It is true that §§ 15 and 16 still may be politically persuasive because they represent the views of a majority of the voters who voted on the issue. Because §§ 15 and 16 standing alone are not binding, however, they are not unconstitutional and should be allowed to stand as a democratically

determined expression of the political will of the people of Missouri.

Finally, I see no reason why upholding §§ 15 and 16 is improper federal court micro-management of the Missouri Constitution. At most, the last clause of § 16 may be superfluous, but superfluity does not equal unconstitutionality. Nothing remaining in § 16 is unconstitutional, and I think the entire section could remain without severing any part of it. Furthermore, out of respect for the people of Missouri and their Missouri Constitution, I believe we become less entangled in state law issues by striking down only those portions of the Missouri Amendment that are clearly unconstitutional.

Accordingly, I respectfully dissent from that portion of the court's opinion that strikes down §§ 15 and 16 of the Missouri Amendment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
v.
REBECCA MCDOWELL COOK,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Donald James Gralike brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Missouri Secretary of State Rebecca McDowell Cook in her official capacity. Plaintiff seeks to enjoin defendant from implementing and enforcing a recent amendment to Article VIII of the Missouri Constitution. The Amendment to Article VIII directs members of the United States Congress from Missouri to use their delegated powers to pass a Congressional Term Limits Amendment to the United States Constitution. The Amendment also requires candidates for United States Congress to either support the congressional term limits amendment or have words stating that they failed to support the amendment placed by their names on the ballot.

On January 15, 1997, I entered an order granting in part and denying in part defendant's first Motion to Dismiss on standing, sovereign immunity and abstention grounds. In that order, I granted defendant's motion as to plaintiff's claim that the amendments to Article VIII violated Article III of the Missouri Constitution but denied defendant's motion as to the remainder of plaintiff's claims.

On January 29, 1998, I entered an order granting in part and denying in part defendant's "Motion to Dismiss for Failure to State a Claim." In that order, I granted defendant's motion as to plaintiff's claim that a jurisdictional provision of Article VIII violates the Supremacy Clause, but denied defendant's motion as to the remainder of plaintiff's claims.

Plaintiff's remaining claims are as follows: In Count I of the Complaint, plaintiff claims that Article VIII, as amended, places impermissible additional qualifications on candidates for United States Congress in violation of Article I of the United States Constitution. In Count II, plaintiff claims that Article VIII is unconstitutionally vague. In Count III, plaintiff claims that Article VIII violates his First Amendment right to free speech. Finally, in Count V, plaintiff claims that Article VIII violates Article V of the United States Constitution.

Now, plaintiff moves for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

I. SUMMARY JUDGMENT STANDARD

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); *Inland Oil & Transp. Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir. 1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581

F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 2553.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the *absence* of genuine issues of material fact. However, the moving party *is not required* to support its motion with affidavits or other similar materials *negating* the opponent's claim. *Id.* (emphasis added).

The nonmoving party then must go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 248, 106 S. Ct. 2505, 2510 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a

verdict for that party. *Anderson*, 106 S. Ct. at 2511. Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

II. UNDISPUTED FACTS

During the November 1996 general election, the Missouri voters passed by majority vote a ballot initiative to amend Article VIII of the Missouri Constitution. The Amendment added Sections 15-22 (hereinafter collectively referred to as the Article VIII Amendment) which are intended to promote the passage of a federal constitutional amendment setting term limits for members of the United States Congress. *See* Article VIII, § 15.

Section 16 contains a proposed amendment to the United States Constitution that would limit the number of terms that one individual can serve as United States Senator or Representative.

Section 17(1) directs each member of the Missouri delegation to Congress to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in section 16]." Section 17(2) requires that each Missouri Senator or Representative who fails to support the term limits amendment in one of several enumerated ways shall have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" placed adjacent to that person's name on the primary and general election ballots.

For non-incumbent candidates for Congress, Section 18 requires that they be given an opportunity to take a "Term Limits" pledge each time they file to run for congressional office. For those who decline to make the pledge, Section 18(1) requires that the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed next to their names on the primary and general election ballots.

The Secretary of State must decide whether words stating failure to support term limits should be placed next to a candidate's name. § 19. In making that determination, the Secretary must consider timely submitted public comments. § 19(2). The Secretary must declare within five days after the filing deadline whether the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be placed next to a candidate's name. § 19(4). After the Secretary makes that determination, subsections 19(5) - (6) give an aggrieved "elector" or "candidate" the opportunity to appeal the Secretary's decision to the Missouri Supreme Court. On appeal, an aggrieved "candidate" has the burden to prove by clear and convincing evidence that the Secretary erred by placing a designation next to his or her name. On the other hand, if an aggrieved "elector" appeals the Secretary's decision not to place the words stating lack of support for term limits next to a candidate's name, the Secretary has the burden to prove by clear and convincing evidence that the candidate met the requirements to avoid having the words placed next to the candidate's name.

Section 20 provides for automatic repeal of Sections 15-22 if the Congressional Term Limits Amendment becomes part of the United States Constitution. Section 21 provides that "[a]ny legal challenge to this Amendment shall be filed as an original action before the Supreme Court of [Missouri]." Finally, Section 22 provides for severability if any portion of the amendment is declared invalid or unconstitutional.

Plaintiff Donald Gralike is a resident of Missouri's Third Congressional District. He is more than 25 years of age. He has been a United States citizen for more than seven years and is a taxpayer and registered voter in Missouri. Gralike was a candidate for United States Representative for the Third Congressional District of Missouri in 1976. He is currently considering announcing his candidacy for that position in the 1998 election. Under Missouri law, Gralike may not formally file a declaration of candidacy until February 1998. Plaintiff has stated that he is not inclined to take the pledge described in Section 18 of Article VIII. Plaintiff has also stated that he understands that his failure to take

the pledge could lead to his having words stating that he has failed to support term limits placed next to his name on the election ballot.

III. DISCUSSION AND ANALYSIS

A. Plaintiff's Arguments that He is Entitled to Summary Judgment on His Claims that the Article VIII Amendment Violates Articles I and V of the United States Constitution and the First Amendment Right to Free Speech

In the January 29, 1998, order, I denied defendant's motion for judgment on the pleadings on plaintiff's claims in Counts I, III and V of his Complaint.

In Part III.A. of the January 29, 1998, order, I concluded that plaintiff had stated a claim that the Article VIII Amendment, on its face, has the sole purpose of creating additional qualifications for Congress indirectly and has the likely effect of handicapping a class of candidates for Congress. Because plaintiff had stated a claim that the Amendment violates Article I, I denied defendant's motion for judgment on the pleadings.

In Part III.B. of the January 29, 1998, order, I concluded that plaintiff has stated a claim that the Article VIII Amendment infringes on a candidate's protected First Amendment right to free speech and that the Amendment is not narrowly tailored to promote a compelling state interest. Therefore, I concluded that plaintiff had stated a claim that the Article VIII Amendment violates the First Amendment.

In Part III.E. of the January 29, 1998, order, I concluded that plaintiff has stated a claim that the Article VIII Amendment violates Article V of the United States Constitution by attempting to give power to the citizens of Missouri that the Constitution reserves to Congress and state legislative bodies.

In each of Counts I, III, and V of his Complaint, plaintiff alleges that the Amendment is unconstitutional on its face. Defendant concedes that "the issues presented by plaintiff are purely legal issues." Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment at 6.

Because there are no factual issues, the legal issues could have been resolved as a matter of law on cross-motions for judgment on the pleadings. However, plaintiff did not file a motion for judgment on the pleadings or seek any relief in his opposition to defendant's motion. Therefore, due to the procedural posture of the case when ruling on defendant's motion for judgment on the pleadings, I was only able to conclude plaintiff had stated a claim for relief. Had plaintiff filed a motion for judgment on the pleadings, based on the legal analyses that I conducted in the January 29, 1998, order, I would have concluded that the Article VIII Amendment violates Articles I and V of the United States Constitution and the First Amendment to the United States Constitution.

Now that the plaintiff has filed a Motion for Summary Judgment, I must follow the analysis appropriate for a motion under Rule 56, Federal Rules of Civil Procedure.

Because plaintiff's claims in Counts I, III, and V depend only on the constitutionality of the Amendment on its face, and because defendant concedes that there are no issues of material fact pertaining to the claims in Counts I, III and V, plaintiff has shown that there are no genuine issues of material fact for trial. Therefore, the issues raised by plaintiff are legal and can be resolved based on the briefs filed in connection with defendant's Motion for Judgment on the Pleadings and in connection with plaintiff's Motion for Summary Judgment.

For the reasons stated in Parts III.A., III.B., and III.E. of the January 29, 1998, order, I concluded that plaintiff had stated claims upon which relief could be granted on Counts I, III and V. Because defendant concedes there are no factual issues pertaining to the claims asserted in Counts I, III and V, and because defendant

has added no legal argument conflicting with the conclusions reached in the January 29, 1998, order, plaintiff has established that he is entitled to judgment as a matter of law on Counts I, III, and V. Specifically, plaintiff has established that Sections 15, 16, 17, 18, and 19 of Article VIII violate Articles I and V of the United States Constitution and the First Amendment to the United States Constitution.

As an alternative analytical approach to reach the same conclusion, plaintiff has established that he is entitled to judgment as a matter of law on Counts I, III and V for the reasons stated in Parts IIIA, IIIB, and IIIE of the January 29, 1998, order.

Because there are no issues of fact precluding judgment as a matter of law, plaintiff's Motion for Summary Judgment on Counts I, III, and V of his Complaint will be granted. Defendant will be permanently enjoined from implementing and enforcing Sections 15, 16, 17, 18, and 19 of Article VIII to the Missouri Constitution.

B. Plaintiff's Argument that He is Entitled to Summary Judgment on His Claim that the Article VIII Amendment Is Unconstitutionally Vague and Overbroad

In the January 29, 1998, order, I denied defendant's Motion for Judgment on the Pleadings on plaintiff's claim in Count II of his Complaint because I concluded that plaintiff had alleged facts in his Complaint sufficient to state a claim that the Article VIII Amendment is unconstitutionally vague and overbroad.

Because I have already concluded that plaintiff is entitled to summary judgment on Counts I, III, and V of the Complaint, it is not necessary to consider whether he is also entitled to summary judgment on Count II. Plaintiff would not be entitled to any additional relief if I were to determine that he is also entitled to summary judgment on Count II.

IV. CONCLUSION

Accordingly, it is ORDERED that:

1) Plaintiff's Motion for Summary Judgment (Doc. No. 59) is granted; and

2) defendant is permanently enjoined from implementing and enforcing Sections 15, 16, 17, 18, or 19 of Article VIII of the Missouri Constitution.

/s/D. Brook Bartlett
D. Brook Bartlett
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
February 18, 1998

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
v.
REBECCA MCDOWELL COOK,
Defendant.

ORDER GRANTING "DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM" AS TO COUNT IV OF PLAINTIFF'S FIRST AMENDED COMPLAINT AND DENYING "DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM" AS TO COUNTS I, II, III AND V OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Donald James Gralike brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Missouri Secretary of State Rebecca McDowell Cook in her official capacity. Plaintiff seeks to enjoin defendant from implementing and enforcing a recent amendment to Article VIII of the Missouri Constitution. The Amendment to Article VIII directs members of the United States Congress from Missouri to use their delegated powers to pass a Congressional Term Limits Amendment to the United States Constitution. The Amendment also requires candidates for United States Congress to either support the congressional term limits amendment or have words stating that they failed to support the amendment placed by their names on the ballot.

In Count I of the Complaint, plaintiff claims that Article VIII, as amended, places impermissible additional qualifications on

candidates for United States Congress in violation of Article I of the United States Constitution. In Count II, plaintiff claims that Article VIII is unconstitutionally vague. In Count III, plaintiff claims that Article VIII violates his First Amendment right to free speech. In Count IV, plaintiff claims that a jurisdictional provision of Article VIII violates the Supremacy Clause. Finally, in Count V, plaintiff claims that Article VIII violates Article V of the United States Constitution.

On January 15, 1997, I entered an order granting in part and denying in part defendant's first Motion to Dismiss on standing, sovereign immunity and abstention grounds. In that order, I granted defendant's motion as to plaintiff's claim that the Amendment to Article VIII violates Article III of the Missouri Constitution but denied defendant's motion as to the remainder of plaintiff's claims.

Now, defendant moves to dismiss Plaintiff's First Amended Complaint under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted.

I. BACKGROUND

During the November 1996 general election, the Missouri voters passed by majority vote a ballot initiative to amend Article VIII of the Missouri Constitution. The Amendment added Sections 15-22 (hereinafter collectively referred to as the Article VIII Amendment) which are intended to promote the passage of a federal constitutional amendment setting term limits for members of the United States Congress. *See* Article VIII, § 15.

Section 16 contains a proposed amendment to the United States Constitution that would limit the number of terms that one individual can serve as United States Senator or Representative.

Section 17(1) directs each member of the Missouri delegation to Congress to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in section 16]." Section 17(2) requires that each Missouri Senator or

Representative who fails to support the term limits amendment in one of several enumerated ways shall have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" placed adjacent to that person's name on the primary and general election ballots.

For non-incumbent candidates for Congress, Section 18 requires that they be given an opportunity to take a "Term Limits" pledge each time they file to run for congressional office. For those who decline to make the pledge, Section 18(1) requires that the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed next to their names on the primary and general election ballots.

The Secretary of State must decide whether words stating failure to support term limits should be placed next to a candidate's name. § 19. In making that determination, the Secretary must consider timely submitted public comments. § 19(2). The Secretary must declare within five days after the filing deadline whether the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be placed next to a candidate's name. § 19(4). After the Secretary makes that determination, subsections 19(5) - (6) give an aggrieved "elector" or "candidate" the opportunity to appeal the Secretary's decision to the Missouri Supreme Court. On appeal, an aggrieved "candidate" has the burden to prove by clear and convincing evidence that the Secretary erred by placing a designation next to his or her name. On the other hand, if an aggrieved "elector" appeals the Secretary's decision not to place the words stating lack of support for term limits next to a candidate's name, the Secretary has the burden to prove by clear and convincing evidence that the candidate met the requirements to avoid having the words placed next to the candidate's name.

Section 20 provides for automatic repeal of Sections 15-22 if the Congressional Term Limits Amendment becomes part of the United State Constitution. Section 21 provides that "[a]ny legal challenge to this Amendment shall be filed as an original action before the Supreme Court of [Missouri]." Finally, Section 22

provides for severability if any portion of the Amendment is declared invalid or unconstitutional.

Plaintiff Donald Gralike is a resident of Missouri's Third Congressional District. He is more than 25 years of age. He has been a United States citizen for more than seven years and is a taxpayer and registered voter in Missouri. Gralike was a candidate for United States Representative for the Third Congressional District of Missouri in 1976. He is currently considering announcing his candidacy for that position in the 1998 election. Under Missouri law, Gralike may not formally file a declaration of candidacy until February 1998.

II. STANDARD FOR MOTION TO DISMISS

Because defendant filed an answer in this case before filing her motion to dismiss, this is technically a motion for a judgment on the pleadings under Rule 12(c), Federal Rules of Civil Procedure. However, Rule 12(c) motions are evaluated using the same standard as motions under Rule 12(b), Federal Rules of Civil Procedure. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

In ruling on a motion to dismiss, it is the court's obligation to accept as true all factual allegations in the Complaint and all inferences that reasonably may be drawn from those facts and to construe the Complaint in the light most favorable to the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 1848-49 (1984)). A complaint should not be dismissed for failure to state a claim for relief unless it appears beyond a doubt that the plaintiff can prove no facts that would entitled [sic] plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957).

III. ANALYSIS

A. Defendant's Argument that She is Entitled to Judgment on the Pleadings on Plaintiff's Claim that the Article VIII Amendment Violates Article I of the United States Constitution

In Count I of plaintiff's First Amended Complaint, plaintiff alleges that the Article VIII Amendment violates Article I of the United States Constitution by imposing qualifications for candidacy for United States Congress in addition to those enumerated in Article I. Complaint ¶¶ 33-36.

Defendant claims that plaintiff has failed to state a claim for relief in Count I because the Article VIII Amendment does not impose any impermissible additional qualifications for candidates for Congress and is a valid exercise of power under Article I, § 4, cl. 1 (the Elections Clause).

The Supreme Court most recently examined state authority to regulate federal congressional elections in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799, 115 S. Ct. 1842 (1995). The plaintiff in *U.S. Term Limits* challenged an amendment to the Arkansas Constitution that precluded persons who had already served more than a specified number of terms in Congress from having their names placed on the ballot. *Id.* at 1845-46.

A majority of the Supreme Court in *U.S. Term Limits* held that states do not have the power to "supplement the exclusive qualifications set forth in the text of the Constitution." *Id.* at 1866. Those "exclusive qualifications" include the age, citizenship, and residency requirements set forth in Article I, §§ 2-3. *Id.* at 1947; *see also id.* n.2 (discussing several additional constitutional provisions arguably setting "qualifications" for Congress). The Court held that the provision in the Arkansas Amendment prohibiting multiple-term incumbents' names from being placed on the ballot was an attempt to impose indirectly an impermissible additional qualification. Therefore, the provision violated Article I. *Id.* at 1871. In announcing its holding, the Court stated that "a

state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 1871.

Defendant offers two arguments why the Amendment to Art. VIII does not violate Article I as construed in *U.S. Term Limits*. First, defendant claims that to violate Article I, a state requirement must contain an "outright disqualification" that categorically bars a specific class of potential candidates from having their names placed on the ballot. Defendant's Suggestions at 11-13. Defendant argues that the Article VIII Amendment does not prohibit any candidate from having his or her name on the ballot, regardless of the candidate's position on term limits, and, therefore, it is not an "outright disqualification."

Defendant's argument that only "outright disqualifications" from eligibility or access to the ballot violate Article I lacks merit. The Court's decision in *U.S. Term Limits* was not based on the conclusion that the subject restriction amounted to an outright disqualification of a class of candidates. Instead, the Supreme Court held that any attempt to indirectly add qualifications for congressional office by making it more difficult for a class of candidates to be elected violates Article I. *See id.* at 1867-68.

In *U.S. Term Limits*, the defendant claimed that the Arkansas Amendment did not constitute an impermissible added qualification because it did not disqualify the long-term incumbents from service in Congress but rather merely kept their names from appearing on the ballot. *U.S. Term Limits*, 115 S. Ct. at 1866-67. Thus, the defendant argued, long-term incumbents could still run as write-in candidates and serve in office if elected. *Id.* The Supreme Court rejected that argument, stating: "In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand." *Id.* at 1868. Similarly, here, the fact that the Article VIII Amendment does not disqualify a class of candidates from having their names placed on the ballot--but rather disadvantages a class of candidates--makes the Amendment suspect under the reasoning in *U.S. Term Limits*.

Defendant's second argument is that the Article VIII Amendment is constitutional under the Court's holding in *U.S. Term Limits*. Defendant argues that plaintiff has failed to allege facts in his complaint sufficient to satisfy both elements of the Court's holding that "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." Defendant's suggestions at 13-14. Defendant argues that under *U.S. Term Limits*, a plaintiff must show that the state amendment violates both the purpose and effect elements in order to establish that the state amendment is unconstitutional. *Id.*

1. The Article VIII Amendment Has the Sole Purpose of Creating Additional Qualifications Indirectly

The sole purpose of the Article VIII Amendment is apparent from the wording of the Amendment. The stated purpose of the Article VIII Amendment is set forth in the Preamble: "The people of Missouri hereby state our intention that this initiative lead to the adoption of the following U.S. Constitutional Amendment [set forth in § 16]." Mo. Const. Art. VIII, § 15. Each provision of the Amendment is designed to accomplish this purpose. The approach taken to obtain adoption of a term limits amendment is to make support for a term limits amendment a qualification for congressional office. Candidates for Congress are required to state their position on term limits. If a candidate fails to support term limits then the Secretary must place words so stating next to the candidate's name on the ballot. Thus, the Article VIII Amendment is an attempt to add indirectly a new qualification for the offices of United States Senator and Representative from Missouri, i.e., support of term limits.

Defendant argues that the Amendment is a valid exercise of state power under the Elections Clause, which provides that "[t]he Time, Places and Manner of Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof." U.S. Const. Art. I, § 4, cl. 1. Defendant argues that the Article VIII Amendment has a proper purpose under

Article I because the Amendment ensures the disclosure of important candidate information to voters. Defendant's Reply at 2.

States have authority under the Elections Clause to implement procedural regulations aimed at "maintain[ing] the integrity of the political process." *U.S. Term Limits*, 115 S. Ct. at 1869-70.

In holding the Arkansas Amendment unconstitutional in *U.S. Term Limits*, the Court distinguished between procedural regulations that are valid under the Elections Clause, and substantive qualifications that violate Article I. A state's procedural regulations are valid under the Elections Clause when they serve "the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in congress." *Id.* at 1870. The Court concluded that the sole purpose of the Arkansas Amendment at issue in *U.S. Term Limits* "was to limit the terms of elected officials," and, therefore, it was not a valid exercise of power under the Elections Clause. *Id.* at 1871.

In this case, the undisputed purpose of the Missouri Amendment is to encourage congressional delegates to adopt a constitutional term limits amendment, not to ensure that voters are fully informed about the candidates. Significantly, defendant has not argued--nor could she in light of the statement in the preamble to the contrary--that voter education was the ultimate purpose behind the Article VIII Amendment. Even if one of the purposes of the Amendment is to ensure that Missouri voters are aware of a candidate's position on term limits, that purpose is not independent of an attempt to impose an additional qualification on candidates for Congress. Therefore, like the statute at issue in *U.S. Term Limits*, plaintiff stated a claim that the Article VIII Amendment has the sole purpose of creating indirectly an additional qualification for United States Congress.

2. The Article VIII Amendment Has the Likely Effect of Handicapping a Class of Candidates

Defendant argues that plaintiff has failed to show that the Amendment has the "likely effect of handicapping a class of candidates" because plaintiff has failed to demonstrate how having the words stating lack of support for term limits placed next to his name on the ballot would hurt plaintiff's chances of being elected. Defendant acknowledges that plaintiff alleges in his Complaint that he believes that having the words stating lack of support for them next to his name will hurt his chances of being elected. However, defendant argues that "plaintiff's pleading alone does not establish that Missouri Article VIII will 'have the likely effect of handicapping a class of candidates.'" Defendant's Suggestions at 14.

Presumably, defendant is arguing that whether a state amendment has the "likely effect of handicapping a class of candidates" is a question of fact that cannot be resolved based on the pleadings alone. However, for the purposes of a motion for judgment on the pleadings, the factual allegations in the pleadings must be accepted as true. Moreover, defendant's argument runs counter to defendant's assertion that"[t]he issues before the Court are issues of law." Defendant's Reply at 1.

The approach taken by the Supreme Court in *U.S. Term Limits* suggests that the question whether a state provision has the "likely effect of handicapping a class of candidates" is not a question of fact. In coming to the conclusion that the Arkansas Amendment had the likely effect of handicapping long-term incumbents, the majority expressly refused to rely on evidence that a write-in candidate had a slim chance of success. *U.S. Term Limits*, 115 S. Ct. at 1871; *see also U.S. Term Limits*, 115 S. Ct. 1910-11 & n.40 (Thomas, J., dissenting) (noting that it would have been improper for the majority to have relied on any binding factual determinations made by the Arkansas trial court on issues of disputed fact in ruling cross-motions for summary judgment).

Therefore, it is not necessary to have a factfinder decide as a factual matter whether the challenged state law will seriously harm a specific candidate's chances of winning the election. The question whether a state amendment has the likely effect of handicapping a class of candidates is a question of law for the

Court. The question is simply whether the Missouri Amendment is likely to put a class of candidates at a disadvantage as compared to other candidates.

There can be little dispute that the Missouri Amendment singles out an identifiable class of candidates for special treatment. Only those non-incumbent candidates who refuse to take the "Term Limits Pledge" and those incumbent candidates who the Secretary of State determines have failed to act in favor of term limits as required by the Amendment will have words stating failure to support term limits placed next to their names on the ballot. Candidates who agree to take the pledge or who maintain a record on the term limits issue that satisfies the Secretary will not have the informative words placed next to their names on the ballot.

The next question is whether the Amendment is likely to disadvantage the class of candidates that will have the informative words placed next to their names. As discussed previously in this opinion, the Amendment was adopted by the voters and is intended to obtain the support of Missouri congressional delegation for a term limits amendment. The voters, by adopting the Amendment, sought to identify all congressional candidates who do not support term limits. In light of the purpose of the Amendment, the only intended effect of placing the words next to a name on the ballot is to disadvantage the candidate in the eyes of term limits supporters in the electorate.

Further, the words stating lack of support for term limits are the only issue-specific information that can appear next to any candidate's name. The words are printed in capital letters. Significantly, the language used is pejorative. Both "DISREGARDED VOTERS' INSTRUCTIONS" and "DECLINED TO PLEDGE" carry negative connotations that suggest that the candidate has done something wrong and imply official state disapproval of those candidates branded with a designation.

States have the authority under the Elections Clause to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process." *U.S. Term*

Limits, 115 S. Ct. at 1842 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9, 103 S. Ct. 1564, 1570 n.9 (1983). States may impose procedural regulations intended to eliminate voter confusion and to promote candidate disclosure by candidates. *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S. Ct. 533 (1986); *Storer v. Brown*, 415 U.S. 780, 103 S. Ct. 1564 (1974)). Even if one could persuasively argue that the Amendment was intended to eliminate voter confusion and to promote candid disclosure (which it was not), the Article VIII Amendment is not evenhanded. Only those candidates who refuse to support term limits are singled out and branded with a conspicuous and negative statement next to their names. Therefore, plaintiff has stated a claim that the Article VIII Amendment is likely to handicap those candidates who refuse to decline to support term limits.

In drawing a distinction between what a state may and may not do consistent with the Elections Clause, the Supreme Court in *U.S. Term Limits* stated that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits*, 115 S. Ct. at 1869. The undisputed intent of the Missouri Amendment is to influence the outcome of voting on any proposed term limits amendment by favoring the class of candidates who support the term limits amendment set forth in the Amendment to Article VIII. Plaintiff has stated a claim that this attempt to influence the outcome of federal elections by disfavoring the class of candidates who refuse to support the term limits amendment set forth in Article VIII violates Article I and exceeds the power granted to states under the Elections Clause to regulate the time, place, and manner of federal elections. Therefore, defendant's motion for judgment on the pleadings on plaintiff's claim that the Amendment violates Article I of the United States Constitution will be denied.

B. Defendant's Claim that She is Entitled to Judgment on the Pleadings on Plaintiff's Claim that the Article VIII Amendment Violates the First Amendment Right to Free Speech

Plaintiff argues that the Article VIII Amendment infringes on plaintiff's freedom of expression by attempting to compel a candidate to take a specific position in favor of term limits and by limiting the candidate's ability to fully express the candidate's views on term limits. *See* Plaintiff's Response at 23-26. Plaintiff claims that the Amendment restricts a candidate's ability to fully express the candidate's views on term limits by requiring the candidate to take a simple yes or no position on term limits without permitting an explanation.

Defendant argues that the Article VIII Amendment does not violate the First Amendment right against compelled speech because running for office is a voluntary act and because a candidate does not face any criminal penalties for failing to speak in favor of term limits.

1. The Article VIII Amendment Infringes on Plaintiff's Protected First Amendment Rights

The First Amendment, made applicable to the states through the Fourteenth Amendment, prohibits a state from making any law "abridging the freedom of speech." *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 1891 (1988) (quoting U.S. Const. Amend I). The First Amendment was "fashioned to assure the unfettered interchange of ideas for bringing about political and social changes desired by the people." *Id.* Therefore, the First Amendment offers its greatest protection for political speech and speech that involves matters of public concern. *Id.* at 1891-92 (citation omitted). Furthermore, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831 (1974) (holding that a state law requiring newspapers to publish the replies of political candidates whom they had criticized violated the First Amendment right to free press).

Candidates for political office are not afforded any less First Amendment protection than any other individual. *Brown v.*

Hartlage, 556 U.S. 45, 53, 102 S. Ct. 1523, 1524 (1982). In fact, the First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* Therefore, candidates must be afforded an "unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 1529.

The Supreme Court has held that the First Amendment protects candidates from state laws that "reduce the quantity of [a candidate's] expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S. Ct. 612, 634 (1976). Accordingly, the Court held that the First Amendment protects candidates from laws that restrict the amount of money a candidate can spend on political advertising during a campaign. *Id.* Similarly, a law that prohibited the payment of petition circulators infringed on "core political speech" by limiting the "number of voices" who could speak on a particular public issue, the hours they could speak, and the size of the audience they could reach. *Meyer*, 108 S. Ct. at 1892. Because the restriction had the effect of reducing the total quantum of speech on a particular public issue, it burdened important First Amendment rights. *Id.* at 1892-93.

Like the restrictions at issue in *Meyer* and *Buckley*, the term limits designation provisions of Article VIII burden a candidate's right to speak freely on the issue of term limits. The amendment limits a candidate's speech in several ways.

First, the Amendment punishes candidates for speaking out against term limits by requiring the Secretary of State to place negative words next to their names on the ballot. Thus, the Amendment interferes directly with a candidate's right to speak freely on a matter of public concern in the same way that criminal sanctions or fines would.

Second, like the laws at issue in *Wooley* and *Miami Herald*, the amendment compels candidates to speak on the term limits issue. Non-incumbent candidates are required to take the term limits pledge or face the penalty of having negative words placed next to their name on the ballot. Similarly, incumbent candidates must take affirmative action to show their support for term limits to avoid having the negative words placed next to their names on the ballot. The Amendment uses the threat of being disadvantaged in the election to coerce candidates into taking a position on the term limits issue. A state law infringes on protected First Amendment rights whether it compels an individual to speak by threatening criminal prosecution, *see, e.g., Wooley*, 97 S. Ct. at 1435, or rather simply requires an individual to speak as a condition precedent to engaging in an otherwise lawful activity, *see, e.g., Miami Herald*, 94 S. Ct. at 2839. Thus, the Amendment infringes on a candidate's right to refrain from speaking on an issue. Also, the Amendment attempts to coerce candidates into taking a specific position on the term limits issue. The Article VIII Amendment requires candidates to either speak in favor of the term limits amendment set forth in the Article VIII Amendment or face having the Secretary of State place negative wording next to the candidates' names on the ballot.

Further, a candidate for political office does not waive the candidate's First Amendment rights by running for office. The right against state-compelled speech does not lose its force just because affected individuals could voluntarily refrain from undertaking the activity that will subject them to the compelled speech. The plaintiff in *Wooley*, for example, could have refrained from owning a car to avoid having to display the state motto on his licence place, yet the Supreme Court still found unconstitutional a state law that penalized plaintiff for covering up the motto on his license place. *See Wooley*, 97 S. Ct. at 1434; *see also Miami Herald*, 94 S. Ct. at 2839 (holding that the right-of-access law infringed on protected First Amendment rights because it might discourage editors from engaging in the voluntary act of publishing controversial statements about candidates).

Therefore, plaintiff has stated a claim that the Amendment infringes on a candidate's protected First Amendment rights.

2. The Article VIII Amendment is Subject to Strict Scrutiny

Having concluded that plaintiff has stated a claim that the Article VIII Amendment infringes on the First Amendment rights of a candidate for Congress in Missouri, it is necessary to decide whether the State's interest in enforcing the Amendment is sufficiently compelling to outweigh the burden it places on candidates' speech. *Wooley*, 97 S. Ct. at 1436.

Defendant argues that a lower level of scrutiny should be applied in this case, one that "weighs the magnitude of the states' [sic] interest versus the extent of the burden imposed." Defendant's suggestions at 23 (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 107 S. Ct. 544, 548 (1986)). Defendant relies on the Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992), in which the Supreme Court held that when state laws impose only "reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* at 2063 (internal quotation marks omitted).

In *Burdick*, the Court concluded that Hawaii's prohibition on write-in voting was a "reasonable, nondiscriminatory restriction." *Id.* at 2063-66 (finding that "there is nothing content-based about a flat ban on all forms of write-in ballots").

State laws that restrict speech based on its content are subject to strict scrutiny. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 2459 (1994). "[A]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of their ideas or views expressed are content-based." *Turner Broadcasting*, 114 S. Ct. at 2459.

Here, in stark contrast to the situation in *Burdick*, the Article VIII Amendment, on its face, favors a particular viewpoint

on term limits and penalizes candidates who fail to support term limits. As a content-based restriction on speech, the Amendment is subject to strict scrutiny.

Defendant next argues that even if strict scrutiny is applied, the Article VIII Amendment does not violate the First Amendment because Missouri has a compelling interest in "promoting an informed electorate." Defendant's Suggestions at 24. According to defendant, the words stating failure to support term limits perform a function similar to the placement of party labels next to a candidate's name on the ballot: they provide a "shorthand designation" for each candidate's view on term limits. *Id.* at 25; *see Tashjian*, 107 S. Ct. at 551-52 (recognizing the legitimate state interest in fostering an informed and educated electorate).

Even assuming that a state has a compelling interest in promoting an informed electorate, the approach taken by the State of Missouri in the Article VIII Amendment cannot withstand strict scrutiny. First, as discussed earlier in this opinion, the ultimate purpose of the Article VIII Amendment is to encourage the passage of a term limits amendment. The ultimate purpose of the Amendment belies the state's argument that the Amendment was intended merely to keep voters informed about a candidate's position on term limits. Even recognizing that voter education is a compelling state interest, the Amendment does not appear to be intended or fashioned to attain that goal.

Moreover, even if it is assumed that the Article VIII Amendment does in fact provide voters with more information than they would have in the absence of the Amendment, the Amendment is not narrowly tailored to further the state's interest in educating voters. The position of all candidates on term limits is not put on the ballot. The electorate is told only about the position of those candidates who do not support term limits. Furthermore, the words placed next to certain candidates' names on the ballots tell voters only that those candidates refused to support the specific term limits amendment set forth in Section 16, and they do so in a negative, biased manner. The state may not single out and stigmatize a class of candidates under the guise of

educating the voters. Plaintiff has stated a claim that the Amendment is not narrowly tailored to accomplish a compelling state interest and thus fails to survive strict scrutiny review. Accordingly, defendant's motion for judgment on the pleadings on plaintiff's First Amendment challenge will be denied.

C. Defendant's Motion for Judgment on the Pleadings on Plaintiff's Claim the Article VIII Amendment Is Unconstitutionally Vague and Overbroad

1. The Article VIII Amendment is Unconstitutionally Vague

Plaintiff argues that the Amendment is unconstitutionally vague because the requirements set forth in Sections 17 and 18 and the enforcement mechanisms set forth in Section 19 are confusing and unclear. Plaintiff argues that if the Amendment goes into effect, Missouri Senators and Representatives will face situations in which they do not know how to conform their conduct to the Amendment's requirements. In addition, plaintiff claims that the Amendment grants too much discretion to the Secretary of State to decide whether to place words next to a candidate's name stating that the candidate failed to support term limits without providing sufficient direction about how the Secretary of State should exercise the discretion.

Defendant argues that even if the provisions of Article VIII that relate to incumbent candidates are ambiguous, the Amendment is clear as to plaintiff and other non-incumbent candidates: "if [plaintiff] wishes to avoid the designation [that he does not support term limits]; he must take the pledge." Defendant's Suggestions at 18. Defendant has not addressed whether the Amendment is vague as it applies to incumbent candidates.

To demonstrate that a law is unconstitutionally vague on its face, a plaintiff must show that the law is impermissibly vague in all of its applications. *Village of Hoffman Estates*, 102 S. Ct. at 1193. Therefore, if defendant is correct that the Amendment is not unconstitutionally vague as applied to Gralike and other non-incumbents, plaintiff's vagueness arguments will fail.

However, defendant's argument lacks merit because any ambiguities in the Amendment apply to both incumbent and non-incumbent candidates. First, the enforcement mechanisms in Section 19 apply equally to both incumbent and non-incumbent candidates. Thus, any ambiguities in Section 19 apply to both incumbent and non-incumbent candidates. Second, non-incumbents are affected by the affirmative requirements for incumbents listed in Section 17 because the term limits pledge in Section 18 requires non-incumbents to agree to abide by those requirements if elected. In taking the pledge, a candidate agrees to "use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS' will not appear adjacent to my name." Mo. Const. Art. VIII, § 18(3). Thus, non-incumbent candidates are also affected by any ambiguities in Section 17.

The Supreme Court has recognized several factors to be weighed in evaluating whether a law that is so vague that it violates due process. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 1193 (1982). A court should consider whether the law "trap[s] the innocent by not providing fair warning" about what conduct is lawful and what is not. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298 (1972)). The court should also assess whether the law "impermissibly delegates basic policy matters to [individuals] on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Id.* Finally, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 1193-94.

In articulating those factors, however, the Court warned that they should not "be mechanically applied." Instead, "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." *Id.* at 1193.

Here, an analysis of the first factor recognized by the Supreme Court in *Village of Hoffman Estates* weighs in favor of a conclusion that the Article VIII Amendment is unconstitutionally vague. The Amendment does not provide individuals of ordinary intelligence with sufficient guidance to know what conduct will subject them to having language stating failure to support term limits placed next to their names. For example, Section 17 does not inform a Senator or Representative what must be done in the event that a term limits amendment is proposed that is different than the one set forth in Section 16. Does the Amendment require a Missouri delegate to vote against any term limits legislation that differs in any significant way from the proposed amendment set forth in Section 16, or will failing to vote in favor of term limits legislation in any form subject a Senator or Representative to having the designation placed next to his or her name?

Analyzing the Article VIII Amendment in light of the second factor recognized by the Supreme Court in *Village of Hoffman Estates* also leads to the conclusion that the Amendment is void for vagueness. Section 19(1) states that the "Secretary of State shall be responsible for making an accurate determination as to whether a candidate" should have words stating failure to support term limits placed next to his or her name. However, Section 19 does not set forth any specific standards to guide the Secretary in making an "accurate determination." Section 19(2) requires the Secretary to "consider timely public comments prior to making the determination." However, Section 19 does not set forth what weight should be given to public comments. By delegating broad discretion to the Secretary of State without providing a sufficiently detailed set of guidelines for making the determination, the law "impermissibly delegates basic policy matters" to the Secretary.

In addition, any "elector" can appeal the Secretary's decision *not* to place words stating failure to support term limits next to a candidate's name. If this occurs, the burden is on the *Secretary* to prove by clear and convincing evidence that the candidate should not have words stating failure to support term limits placed next to the candidate's name. § 19(5). The term

"elector" is not defined. It is unclear who is intended to have the power under Section 19(5) to challenge the Secretary's decision not to place the negative words next to a candidate's name on the ballot. Section 19(5) delegates power to an undefined group to challenge the Secretary's decision.

Finally, the most important factor that the *Village of Hoffman Estates* Court recognized as affecting whether a law is unconstitutionally vague--whether the law threatens to inhibit the exercise of constitutional rights--also weighs against the constitutionality of the Amendment in this case based on the allegations in plaintiff's Complaint. Plaintiff stated a claim that the absence of clear standards governing decisionmaking by the Secretary of State and "electors" threatens to chill core political speech. Also, plaintiff has stated a claim that, in the absence of clear standards governing decisionmaking by the Secretary of State, candidates would be uncertain how to act to avoid facing the negative words placed next to their names on the ballot. Candidates, therefore, would be discouraged from candidly expressing their views on terms limits. The same vagueness about standards governing the Secretary of State's discretion could discourage potential candidates from running for office.

Therefore, plaintiff has stated facts in his Complaint sufficient to state a claim that the Article VIII Amendment is unconstitutionally vague.

Defendant has stated that the Secretary plans, at some point, to adopt implementing regulations that will clarify the ambiguities in the requirements and enforcement provisions of the Amendment. Laws containing ambiguous provisions are not void for vagueness if the ambiguities can be clarified through the adoption of administrative rules and regulations. *See Village of Hoffman Estates*, 102 S. Ct. at 1196. On the record before me, however, I cannot assume that regulations will be adopted. Furthermore, I cannot predict whether the regulations adopted will remedy the vagueness problems with the Amendment. Therefore, defendant's Motion to Dismiss Count II of plaintiff's Complaint will be denied.

2. The Article VIII Amendment Is Unconstitutionally Overbroad

To successfully challenge a law for facial overbreadth, a plaintiff must show that the law "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates*, 102 S. Ct. at 1191.

Having already concluded that plaintiff has stated a claim that the Article VIII Amendment impermissibly infringes on protected First Amendment rights and that the Amendment is not narrowly tailored to further a compelling state interest, and having concluded that under the facts alleged in the Complaint the Article VIII Amendment is unconstitutionally vague, it follows that plaintiff has stated a claim that the Article VIII Amendment reaches a substantial amount of constitutionally protected conduct. Therefore, plaintiff has stated a claim that the Article VIII Amendment is unconstitutionally overbroad.

D. Defendant's Motion for Judgment on the Pleadings on Plaintiff's Claim that the Jurisdictional Provision of Article VIII Violates the Supremacy Clause

Article VIII, Section 21 states: "Any legal challenge to this Amendment shall be filed as an original action before the Supreme Court of this State." Plaintiff claims that Section 21 violates the Supremacy Clause of the United States Constitution because it interferes with federal jurisdiction over federal constitutional challenges to the Article VIII Amendment. Plaintiff's Response at 29-30.

Defendant argues that the provision does not limit federal court jurisdiction but rather grants the Missouri Supreme Court original jurisdiction to hear a constitutional challenge to the Amendment. Defendant's Suggestions at 28. Defendant does not argue that this court lacks jurisdiction over this case based on Section 21.

Because defendant does not argue that Section 21 precludes federal jurisdiction in this case, it is not necessary to decide whether Section 21 would violate the Supremacy Clause if it were interpreted to preclude federal court jurisdiction over a federal constitutional challenge to the Article VIII Amendment. Therefore, I agree with defendant that there is no justiciable issue in this case whether Section 21 violates the Supremacy Clause.

Plaintiff argues that even though defendant has not raised the jurisdictional provision as a defense in this case, the issue whether Section 21 violates the Supremacy Clause is justiciable because it is "capable of repetition, yet evading review."

Plaintiff's argument lacks merit.

For an issue to be justiciable because it is "capable of repetition, yet evading review," despite the fact that the plaintiff lacks a concrete interest in the outcome, two circumstances must be present. "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Lewis v. Continental Bank Corp.* 494 U.S. 472, 110 S. Ct. 1249, 1255 (1990) (internal quotations and citations omitted).

Here, neither of the two circumstances is present. If plaintiff were to bring another case in federal court challenging the constitutionality of the Article VIII Amendment and the defendant raises the defense that Section 21 precludes a federal court from hearing a federal constitutional challenge to the Article VIII Amendment, the federal court would have an adequate opportunity to resolve the issue at that time. Furthermore, plaintiff will either prevail in this case in having the Amendment declared unconstitutional, or he will not prevail, in which case any future attempts by plaintiff to challenge the constitutionality of the Amendment would be barred by either res judicata or collateral estoppel. Therefore, it is not likely that plaintiff will ever face again any issue involving the effect of Section 21 on federal

jurisdiction. Accordingly, defendant's motion for judgment on the pleadings will be granted on Count IV of the Complaint.

E. Defendant's Motion for Judgment on the Pleadings on Plaintiff's Claim that Article VIII Violates Article V of the United States Constitution

Plaintiff claims that the Article VIII Amendment violates the requirement in Article V of the United States Constitution that all proposed constitutional amendments come from Congress or from the state legislatures. Plaintiff argues that the Amendment "is an improper attempt by state citizens to control the federal constitutional amendment process." Plaintiff's Response at 32.

Defendant argues that the Amendment is merely intended to bring the issue of term limits before Congress, and is not an attempt by Missouri voters to propose and ratify constitutional amendments in a manner that is not allowed under Article V. Defendant argues that the Article VIII Amendment does not violate Article V because a candidate does not face any adverse consequences for failing to support the proposed term limits amendment.

Article V of the United States Constitution provides:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .

In *Hawke v. Smith*, 253 U.S. 221, 40 S. Ct. 495 (1920), the Court struck down a provision of the Ohio Constitution that allowed Ohio voters to ratify a proposed constitutional amendment by referendum. The Court stated:

> The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred by Congress, and is limited to two methods, by action of the Legislatures of three-fourths of the states or conventions in a like number of states. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

Hawke, 40 S. Ct. at 497 (internal citation omitted).

Two years later, in *Leser v. Garnett*, 258 U.S. 130, 42 S. Ct. 217 (1922), the Supreme Court revisited the issue of a state's power to alter the specific procedures for ratification set forth in Article V. In *Leser*, following the ratification of the Nineteenth Amendment, several registered voters moved to have the names of female voters stricken from the list of registered voters. *Id.* at 217. The plaintiffs argued that the state legislatures lacked power to ratify a federal constitutional amendment that would be invalid under their own state constitutions. In rejecting the plaintiffs' claims, the Court reaffirmed its holding in *Hawke* that the power to ratify a proposed constitutional amendment is a federal power that "transcends any limitations sought to be imposed by the people of a state." *Id.* at 218.

Several lower courts have held unconstitutional state ballot measures intended to indirectly alter the ratification procedures set

forth in Article V. *See State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984) (holding that a state provision violated Article V where the provision directed the state legislature to submit an application to Congress to propose a balanced-budget amendment and provided that if the legislators failed to make the application within 90 days, they would remain in session without pay until they made the application); *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984) (holding that a state provision violated Article V where the provision required that state legislators either make an application to Congress to propose a balanced-budget amendment or lose their salaries). The courts in *Harper* and *Eu* relied on the Supreme Court's holdings in *Hawke* and *Leser* that Article V empowered state legislative bodies--and not the electorate of a state in general--to propose and ratify constitutional amendments. Consequently, they reasoned, the framers of Article V contemplated that the decisions to propose or ratify a constitutional amendment be made through the "deliberative process[es]" in which legislators are "free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise." *Harper*, 691 P.2d at 828; *Eu*, 686 P.2d at 613.

Applying this same reasoning, two other courts that have struck down state provisions nearly identical to the Article VIII Amendment on Article V grounds. *See League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 53-55, 63 (D.Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119, 122-24, 128 (Ark. 1996), *cert. denied sub nom. Arkansas v. Donovan*, 117 S. Ct. 1081 (1997). Both courts held that a referendum passed by the voters of a state which is intended to coerce state and federal elected officials into proposing or ratifying a term limits amendment to the Constitution violates Article V. *Gwadosky*, 966 F. Supp. at 59-61; *Donovan*, 931 S.W.2d at 128. As the *Gwadosky* court stated: "A citizen's role is outside the Article V process. The citizen votes to elect the state's federal and state lawmakers. These elected officials, in turn, through a deliberative and independent process, propose and ratify constitutional amendments when this becomes necessary." *Gwadosky*, 966 F. Supp. at 59-61.

Both the *Gwadosky* and *Donovan* courts held that provisions requiring ballot labels for candidates who failed to support term limits would have an impermissibly coercive impact on state and federal legislators. The threat of having negative words placed next to a legislator's name in the next election would place an undue influence on the legislator to vote in favor of term limits rather than exercise his or her own independent judgment as is contemplated by Article V of the United States Constitution. *Gwadosky*, 966 F. Supp. at 60; *Donovan*, 931 S.W.2d at 128.

In this case, I am persuaded by the decisions of United States District Court for the District of Maine and the Arkansas Supreme Court that the Article VIII Amendment violates Article V. Article V gives authority to Congress and to state legislative bodies, not to the citizens of the states, to propose constitutional amendments. On its face, the Missouri Amendment is intended to "lead to the adoption of the . . . U.S. Constitutional Amendment [in § 16]." The attempt by the people of Missouri to use the threat of negative ballot designations to "encourage" their congressional delegates to propose a term limits amendment violates Article V because it interferes with the independent judgment of state legislators or convention delegates that is contemplated by Article V. Because the Amendment is an attempt by Missouri citizens to do indirectly what Article V prohibits them from doing directly, plaintiff has stated a claim that the Amendments to Article VIII are unconstitutional under Article V of the United States Constitution.

Defendant's argument that a candidate does not face any adverse consequences for failing to support the proposed term limits amendment is not persuasive. The express intent of the Amendment is "that the initiative lead to the adoption of the [term limits amendment]." § 15. Like the nearly identical labels at issue in the *Gwadosky* case, the phrases that the Amendment requires the Secretary to place next to the name of each candidate who fails to support term limits "are explicitly, and this Court believes effectively, targeted to persuade voters that all candidates so labeled are unworthy of public office. They are intentionally intimidating." *Gwadosky*, 966 F. Supp. at 60.

Defendant also argues that plaintiff lacks standing to attack the Article VIII Amendment on Article V grounds because plaintiff is not an incumbent candidate. Defendant's Suggestions at 29.

Section 18 requires non-incumbents to take a "Term Limits" pledge in which each candidate states: "If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." To avoid the negative designation, a non-incumbent must pledge before the election to refrain from exercising his independent judgment on the term limits issue once elected. Therefore, I do not find persuasive defendant's argument that plaintiff lacks standing to raise the Article V issue.

Accordingly, defendant's Motion for Judgment on the Pleadings on Count V will be denied.

V. CONCLUSION

This case is before the Court on defendant's Motion for Judgment on the Pleadings. After reviewing the issues presented in light of the pleadings in this case, many of plaintiff's challenges to the Article VIII Amendment appear to be based on a legal, not factual, basis. In light of conclusions reached in this opinion, plaintiff appears likely to prevail on the merits of several of his legal arguments. Because of the legal nature of many of the issues raised by defendant, a reader of this opinion might be misled by the language used that I am ruling on the merits. My intent is to rule only on the issues raised by defendant involving whether a claim or claims have been stated by the plaintiff. Any ruling on the merits must await further developments in this case.

Accordingly, it is ORDERED that:

1) on Count IV of plaintiff's First Amended Complaint, defendant's Motion for Judgment on the Pleadings (Doc. No. 45) is granted; and

2) on Counts I, II, III, and V, defendant's Motion for Judgment on the Pleadings is denied.

/s/D. Brook Bartlett
D. Brook Bartlett
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
January 29, 1998

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
v.
REBECCA MCDOWELL COOK,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Plaintiff Donald James Gralike brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Missouri Secretary of State Rebecca McDowell Cook in her official capacity. Plaintiff seeks to enjoin defendant from implementing and enforcing a recent amendment to Article VIII of the Missouri Constitution. The Amendment to Article VIII directs members of the United States Congress from Missouri to use their delegated powers to pass a Congressional Term Limits Amendment to the United States Constitution. The Amendment also requires candidates for United States Congress to either support the congressional term limits amendment or have words stating that they failed to support the amendment placed by their names on the ballot.

In Count I of the Complaint, plaintiff claims that Article VIII, as amended, places impermissible additional qualifications on candidates for United States Congress in violation of Article I of the United States Constitution. In Count II, plaintiff claims that Article VIII, as amended, is unconstitutionally vague. In Count III, plaintiff claims that Article VIII, as amended, violates his First Amendment right to free speech. In Count IV, plaintiff claims that

a jurisdictional provision of Article VIII, as amended, violates the Supremacy Clause. In Count V, plaintiff claims that Article VIII, as amended, violates Article V of the United States Constitution. Finally, in Count VI, plaintiff claims that Article VIII, as amended, exceeded the initiative power granted to the people of Missouri under Missouri Constitution Article III.

Defendant now moves to dismiss, arguing that plaintiff lacks standing, that this suit is barred by the Eleventh Amendment to the United States Constitution, and that this Court should refrain from hearing this case under the abstention doctrine.

I. BACKGROUND

During the November 1996 general election, the Missouri voters passed by majority vote a ballot initiative to amend Article VIII of the Missouri Constitution. The Amendment added Sections 15-22 (hereinafter collectively referred to as the Article VIII Amendment) which are intended to promote the passage of a federal constitutional amendment setting term limits for members of the United States Congress. *See* Article VIII, § 15.

Section 16 contains a proposed amendment to the United States Constitution that would limit the number of terms that one individual can serve as United States Senator or Representative.

Section 17(1) directs each member of the Missouri delegation to Congress to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in section 16]." Section 17(2) requires that each Missouri Senator or Representative who fails to support the term limits amendment in one of several enumerated ways shall have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" placed adjacent to that person's name on the primary and general election ballots.

For non-incumbent candidates for Congress, Section 18 requires that they be given an opportunity to take a "Term Limits" pledge each time they file to run for congressional office. For

those who decline to make the pledge, Section 18(1) requires that the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed next to their names on the primary and general election ballots.

The Secretary of State must decide whether words stating failure to support term limits should be placed next to a candidate's name. § 19. In making that determination, the Secretary must consider timely submitted public comments. § 19(2). The Secretary must declare within five days after the filing deadline whether the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be placed next to a candidate's name. § 19(4). After the Secretary makes that determination, subsections 19(5) - (6) give an aggrieved "elector" or "candidate" the opportunity to appeal the Secretary's decision to the Missouri Supreme Court. On appeal, an aggrieved "candidate" has the burden to prove by clear and convincing evidence that the Secretary erred by placing a designation next to his or her name. On the other hand, if an aggrieved "elector" appeals the Secretary's decision not to place the words stating lack of support for term limits next to a candidate's name, the Secretary has the burden to prove by clear and convincing evidence that the candidate met the requirements to avoid having the words placed next to the candidate's name.

Section 20 provides for automatic repeal of Sections 15-22 if the Congressional Term Limits Amendment becomes part of the United State Constitution. Section 21 provides that "[a]ny legal challenge to this Amendment shall be filed as an original action before the Supreme Court of [Missouri]." Finally, Section 22 provides for severability if any portion of the Amendment is declared invalid or unconstitutional.

Plaintiff Donald Gralike is a resident of Missouri's Third Congressional District and more than 25 years of age. He has been a United States citizen for more than seven years and is a taxpayer and registered voter in Missouri. Gralike was a candidate for United States Representative for the Third Congressional District of Missouri in 1976. He is currently considering announcing his

candidacy for that position in the 1998 election. Under Missouri law, Gralike may not formally file a declaration of candidacy until February 1998.

II. STANDARD FOR MOTION TO DISMISS

Because defendant filed an answer in this case before filing her motion to dismiss, this is technically a motion for a judgment on the pleadings under Rule 12(c), Federal Rules of Civil Procedure. However, Rule 12(c) motions are evaluated using the same standard as motions under Rule 12(b), Federal Rules of Civil Procedure. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

In ruling on a motion to dismiss, it is the court's obligation to accept as true all factual allegations in the Complaint and all inferences that reasonably may be drawn from those facts and to construe the Complaint in the light most favorable to the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 1848-49 (1984)). A Complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no facts that would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957).

III. ANALYSIS

A. Standing

Article III of the United States Constitution limits the federal judiciary to resolving "Cases" or "Controversies." *Boyle v. Anderson*, 68 F.3d 1093, 1099 (8th Cir. 1995). The standing doctrine is intended to ensure that a litigant has a sufficient stake in the outcome of a lawsuit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2136 (1992).

In *Lujan*, the United States Supreme Court recognized three elements that a plaintiff must satisfy as an "irreducible constitutional minimum" to have standing: (1) "the plaintiff must

have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) "there must be a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 2136 (internal citations and quotations omitted). The plaintiff bears the burden of establishing the elements of standing. *Id.* at 2137.

Defendant argues that plaintiff fails the first prong of the *Lujan* test. First, defendant argues that because plaintiff has not met the requirements to officially become a candidate for United States Congress, he has no more interest in this matter than any other Missouri citizen. Second, defendant argues that because plaintiff is only "considering" candidacy for the United States Congress, plaintiff's claim of injury or threat of injury is too speculative to support standing.

In response, plaintiff states that when the time comes to declare his candidacy, he intends to do so. Plaintiff points out that Missouri law prohibits election officials from accepting a candidate's declaration before the last Tuesday in February of an election year. *See* Mo. Rev. Stat. § 115.349.

1. Materials Outside the Pleadings May be Considered on a Motion to Dismiss for Lack of Standing

With his response to defendant's motion to dismiss, plaintiff submitted an affidavit entitled Declaration of Donald Gralike. In that statement, plaintiff states his "present intention to run for the United States Congress in the Third District of Missouri in the year 1998."

Plaintiff states in his Suggestions in Response that the Declaration is in response to defendant's Motion to Dismiss. Plaintiff also states that "[b]y submitting this Declaration, which goes beyond the pleadings, it is not plaintiff's intent to convert this motion to a request for summary judgment." Plaintiff's Response to the Defendant's Motion to Dismiss at 1.

On a motion to dismiss for lack of standing, "it is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after all this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S. Ct. 2197, 2206-07 (1975). Therefore, I am permitted to consider the Declaration of Donald Gralike in deciding whether plaintiff has standing.

The statements in the Declaration are somewhat inconsistent with the factual allegations in the Complaint. In the Complaint, Gralike alleges that because of his concerns about the limitations that the Article VIII Amendment would impose on his ability to adequately represent his constituency if elected, plaintiff will not run for Congress if the Article VIII Amendment is valid. Complaint § 32. On the other hand, in the Declaration, Gralike states that he presently intends to run for the United States Congress in 1998. Because I must construe all the materials of record in the light most favorable to the plaintiff, I must resolve any inconsistency in favor of Gralike. Therefore, I will assume for the purpose of ruling on defendant's challenge to standing that plaintiff either presently intends to run for Congress in 1998, or plaintiff desires to run for Congress but will not if the Article VIII Amendment is valid.

2. First Requirement for Standing

a. Plaintiff has a "Legally Protected Interest" Sufficient for Standing

The Supreme Court has taken a liberal view of what constitutes a "legally protected interest." The interest must be more individualized than one which the plaintiff shares with the public at large. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S. Ct. 1055, 1067 (1997); *Warth*, 95 S. Ct. at 2205 (stating that the harm alleged must be more than a "generalized grievance" which the plaintiff shares "in substantially equal measure by all or

a large class of citizens"). Furthermore, the plaintiff must assert his own, personal legal rights and interests. *Lujan*, 112 S. Ct. at 2136; *Warth*, 95 S. Ct. at 2205. However, the plaintiff's alleged interest need not be "significant;" a "small" stake in the outcome will suffice if it is direct. *United States v. SCRAP*, 412 U.S. 669, 687-88, 93 S. Ct. 2405, 2415 (1973). Even purely aesthetic and environmental interests constitute "legally protected interests" if they are concrete and personal to the plaintiff. *Lujan*, 112 S. Ct. at 2137; *SCRAP*, 93 S. Ct. at 2415-16. The Supreme Court has also recognized that a potential candidate for public office has a legally protected interest in becoming a candidate for public office sufficient to satisfy Article III. *Clements v. Fashing*, 487 U.S. 957, 961-62, 102 S. Ct. 2836, 2843 (1982).

Here, plaintiff claims that the Amendment to Article VIII threatens injury to his interest in running for public office. Not every member of the public desires to run for public office. As a future candidate or even a potential future candidate, plaintiff has a greater personal stake in challenging the Article VIII Amendment than does the public at large. Moreover, although plaintiff does allege in his Complaint that he is "generally inclined to be against limitations on terms of members of Congress," Complaint ¶ 28, plaintiff's other allegations state more than merely a "generalized grievance" against the recent Amendment to Article VIII.

Not only does plaintiff claim that he is interested in running for public office, he also claims that he is interested in becoming a candidate for Congress. However, he is concerned about how the Article VIII Amendment would affect his chances of getting elected and how the Article VIII Amendment would affect his ability to adequately represent his constituency if elected. Complaint ¶¶ 32, 36. Therefore, plaintiff has shown that he has a personal stake in the outcome of this matter that is distinct from interests which he shares with the general public.

b. Plaintiff Has Alleged a Sufficiently Imminent Threat of Future Injury to Satisfy the Injury-in-Fact Standing Requirement

In addition to having a sufficiently personal interest in the dispute to satisfy the injury-in-fact standing requirement, the plaintiff must also show that the threatened injury is actual or imminent, not hypothetical or conjectural. *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). However, "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308 (1997) (citation omitted).

One factor in deciding whether plaintiff has alleged an actual or imminent threat of injury is whether plaintiff is challenging a regulation which he himself is the object. When a plaintiff challenges a government regulation that governs the conduct of someone other than the plaintiff, then the plaintiff faces a difficult task to show that the threat of injury to plaintiff is certain and imminent. *Lujan*, 112 S. Ct. at 2137. On the other hand, if a plaintiff challenges a government regulation of which plaintiff himself is the object, "there is ordinarily little question that the [defendant's] action or inaction has caused the injury." *Lujan*, 112 S. Ct. at 2130.

A second factor in deciding whether there is an imminent threat of harm to the plaintiff is the plaintiff's level of certainty that he will engage in conduct that will subject him to injury. *See id.* at 2138. When the plaintiff has been able to state with some certainty an intent to engage in allegedly expected conduct at a relatively specific time in the future, courts have found a sufficiently imminent threat of harm to meet the first element in the *Lujan* test. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212, 115 S. Ct. 2097, 2105 (1995) (holding that plaintiff's statement that it bid on every guardrail project in Colorado, combined with affidavits showing that there had been fourteen guardrail contracts up for bid between 1983 and 1990, created a sufficient certainty that plaintiff would bid on contracts in the future to support standing); *Mausolf v. Babbitt*, 85 F.3d 1295, 1301-02 (8th Cir. 1996) (holding that plaintiff met requirements for standing to challenge an agency's actions in lifting restrictions on snowmobiling because she "swore that she visits the Park at least

twice a year, and described specific, imminent, future trips she had planned"). As articulated by the Supreme Court, a plaintiff has satisfied the imminent threat requirement by showing that injury is "*certainly* impending." *Adarand Constructors*, 115 S. Ct. at 2105 (quoting *Lujan*, 112 S. Ct. at 2138-39 n.2 (emphasis in original)).

In this case, plaintiff has alleged facts supporting a sufficiently imminent threat of injury. First, unlike the plaintiffs in *Lujan*, Gralike is not claiming that he will be indirectly injured by the effects of a state measure aimed at regulating the conduct of third parties. Plaintiff's challenge to the Missouri law is based on how the law would effect [sic] him as a candidate or potential candidate for Congress. Second, plaintiff has done more than merely state that he is interested in becoming a candidate for office at some unknown, future time. Plaintiff has stated that he plans to run for Congress from Missouri's Third Congressional District in the next election in 1998. Declaration ¶ 2. Plaintiff has also outlined his plans to take the formal steps required under Missouri law to declare his candidacy, and has stated that he intends to file for candidacy as soon as Missouri law allows him to do so. Declaration ¶ 3-6. As a non-incumbent candidate for Congress, plaintiff will be subject to the requirements of the Article VIII Amendment, §§ 18-19. In stating his present plans to take specific steps toward becoming a candidate at a specific time in the future, plaintiff has established an imminent threat of certainty impending injury.

Utilizing the alternative assumption about Gralike's intentions, i.e., that he desires to run for Congress but will not do so if the Article VIII Amendment remains in effect, plaintiff satisfies the imminent threat of certainty impending injury factor. In *Clements v. Fashing*, 457 U.S. 957, 961-62, 102 S. Ct. 2836, 2843 (1982), the Supreme Court examined the justiciability of several Texas judges' claims challenging a state constitutional provision that caused judicial officers to automatically resign from their positions if they announced their candidacy for higher judicial office. The plaintiffs were officeholders who alleged that they had not and would not announce their candidacy for higher judicial office because by doing so they would automatically forfeit their

present positions. *Id.* The Court concluded that the plaintiffs met the imminent injury requirement, noting that the plaintiffs had stated:

> In a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision. Given that § 65 provides for *automatic* resignation upon an announcement of candidacy, it cannot be said that § 65 presents only a speculative or hypothetical obstacle to appellees' candidacy for higher judicial office.

Id.

Similarly, here, if Gralike announces his candidacy, he will be subject to Article III, § 18. Therefore, as with the provision at issue in *Clements*, the risk of injury to plaintiff from the provisions of § 18 providing certain restrictions as soon as plaintiff announces his candidacy does not present merely a "speculative or hypothetical obstacle" to Gralike's candidacy.

3. Second Requirement for Standing: Plaintiff Meets the Causation Standing Requirement

Plaintiff has also alleged facts in his complaint sufficient to satisfy the second requirement for standing. Plaintiff seeks to enjoin defendant from enforcing the Article VIII Amendment. There is a direct causal relationship between the challenged conduct--enforcement of the Article VIII Amendment--and the injury--having to face the barriers to candidacy that the Amendment imposes.

4. Third Requirement for Standing: Plaintiff Meets the Redressibility Standing Requirement

Finally, Plaintiff has alleged facts in his complaint sufficient to satisfy the third standing requirement. Enjoining

defendant from enforcing the Article VIII Amendment would remove the disincentives to becoming a candidate that plaintiff claims the Article VIII Amendment creates. Enjoining the enforcement of the new law would also remove the burden that plaintiff claims the Amendment imposes on his chances of being elected and representing his constituents. Therefore a favorable decision for plaintiff would redress plaintiff's alleged injury.

Because plaintiff has satisfied the essential elements of standing under Article III of the United States Constitution, defendant's motion to dismiss for lack of standing must be denied.

B. Plaintiff Meets the Requirements for Injunctive Relief

Defendant argues that even if plaintiff satisfies the requirements for standing under Article III, he has failed to meet the requirements for injunctive relief. In support, defendant cites the Supreme Court's opinion in *Lyons*, in which the Court stated that to qualify for equitable relief in federal court, a plaintiff must show "a likelihood of substantial and immediate irreparable injury." *Lyons*, 103 S. Ct. at 1670 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 674, 679 (1974)). In *Lyons*, the Court held that the plaintiff had failed to meet the requirements necessary to seek an injunction against the defendant's alleged choke hold policy because he could not show a sufficient likelihood that he would be subjected to a chokehold in the future. *Id.*

In contrast to the plaintiff in *Lyons*, Gralike has alleged facts that support his claims that he faces irreparable injury if the Article VIII Amendment is enforced. Here, it is not a matter of speculation whether Gralike will be subject to the alleged illegal government conduct in the future. If he becomes a candidate, Gralike will be subject to the state law that he claims is unconstitutional. Even as an individual who desires to become a candidate, Gralike faces injury because allegedly the mere threat of enforcement will keep him from engaging in conduct that he has a desire to engage in, running for Congress. Therefore, the Supreme Court's decision in *Lyons* is not controlling here. Gralike

has satisfied the requirements for bringing a claim for injunctive relief in this case.

C. Eleventh Amendment Immunity

Defendant's [sic] argues that this suit is barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. Amend. XI. In addition to protecting states from suits by citizens of other states as the plain language of the Eleventh Amendment provides, the Supreme Court has held that the Eleventh Amendment embodies a "broader concept of immunity" that also protects states from suits by its own citizens. *Idaho v. Coeur d'Alene Tribe*, ___ U.S. ___, 117 S. Ct. 2028, 2033 (1997) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890)). Eleventh Amendment immunity extends to suits against state officials acting in their official capacities. *Thomas v. Gunter*, 32 F.3d 1258, 1261 (8th 1994).

However, in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), the Supreme Court recognized an important exception to Eleventh Amendment sovereign immunity. Under the doctrine established in *Young*, Eleventh Amendment immunity does not bar some suits for prospective injunctive relief against state officials acting in their official capacities. *Coeur d'Alene Tribe*, 117 S. Ct. at 2034. *Young* applies in two types of cases. The first, not implicated here, is when a litigant has no forum other than federal court in which to redress an alleged violation of rights. *See id.* at 2035. The second type of case to which *Young* applies is where the plaintiff seeks relief that requires the interpretation of federal law. *Id.* at 2036.

The Court has recognized that whether *Young* applies requires a case-by-case analysis in which a court must balance state interests against the federal interest in enforcing compliance with federal law. *Id.* at 2036-37. In deciding whether *Young* authorizes a federal suit in a particular case, the federal court must look to the

"essential nature and effect of the proceeding." *Id.* at 2038. For example, in cases where the plaintiff seeks to establish ownership over state resources or funds, or where the injunctive relief sought would require the state to pay substantial funds from its treasury, the state's interest in the litigation is so substantial that an action against a state official under *Young* is not justified. *Id.* at 2038-39; *see, e.g., id.* at 2040-41 (holding that sovereign immunity barred suit by Indian tribe seeking to compel state officials to turn over ownership and control of disputed lands and waters); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974) (holding that sovereign immunity barred a suit against state officials when the relief sought required state officials to retroactively pay federal benefits). On the other hand, "[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Coeur d'Alene Tribe*, 117 S. Ct. at 2040; *see, e.g., Millikin v. Bradley*, 433 U.S. 267, 288-90, 97 S. Ct. 2749, 2761-62 (1977) (holding the *Young* doctrine applicable where plaintiff merely sought an injunction against ongoing violations of federal civil rights); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997) (holding that Indian tribe's suit against state officials to enjoin them from committing on-going violations of federal treaty rights fell within the *Young* exception to sovereign immunity); *In re SDDS, Inc.*, 97 F.3d 1030, 1035 (8th Cir. 1996) (holding *Young* applicable in an action to enjoin state officials from enforcing a law in violation of the Commerce Clause).

Here, Gralike asserts that the recent amendment to Article VIII violates Articles I, V, and VI of the United States Constitution, and that enforcement of those provisions would violate his rights under the First and Fourteenth Amendments. Gralike seeks to enjoin Cook from violating federal law by enforcing the Amendment to Article VIII in the future. Gralike does not seek relief that would require the state of Missouri to forfeit control over its funds or resources. Rather, he merely seeks prospective injunctive relief to preclude what he alleges will be an on-going violation of federal law. Therefore, Eleventh Amendment immunity does not support dismissal of Gralike's claims for violation of the United States Constitution.

In her reply, defendant correctly points out that *Young* does not apply to claims against state officials brought under state law. In Count VI, Gralike alleges that the Amendment to Article VIII violates the Missouri Constitution because the Amendment was proposed by the initiative process. Because Count VI alleges a violation of state, not federal law, the Eleventh Amendment protects the State of Missouri from having to defend that claim in federal court. Accordingly, this Court lacks subject matter jurisdiction over Count VI. Count VI will be dismissed.

D. Abstention

Finally, defendant argues that this Court should abstain from exercising jurisdiction in this case because Gralike's federal claims require the interpretation of unsettled questions of state law. Defendant asserts that abstention is proper under the doctrine set forth in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941). Under *Pullman*, a federal court must refrain from exercising jurisdiction over a case that "involves a potentially controlling issue of state law that is unclear, and the decision of this issue by the state courts could avoid or materially alter the need for a decision on constitutional grounds." *Robinson v. City of Omaha*, 866 F.2d 1042, 1043 (8th Cir. 1989).

In general, abstention is the exception, not the rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244 (1976). There are two requirements for *Pullman* abstention to be applicable in a particular case: 1) a controlling issue of state law must be unclear; and 2) a reasonable interpretation of the state law must either be dispositive of the case or substantially modify the federal constitutional question. *Id.* If the unclear issue of state law is "susceptible to a limiting construction" which would render unnecessary the need to resolve the federal constitutional issues, then *Pullman* abstention is appropriate. *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S. Ct. 2502, 2513 (1987). If there is no obvious, reasonable construction of the state law that would resolve the issues in the case, then *Pullman* abstention does not apply and the federal court has a duty to exercise its jurisdiction. *Id.* at 2413.

Defendant argues that because plaintiff has asserted that the Amendment to Article VIII is ambiguous and because plaintiff states in Count II of his Complaint that the Amendment to Article VIII is unconstitutionally vague, the constitutionality of the Amendment to Article VIII rests on an interpretation of the Amendment. Therefore, defendant argues that abstention is appropriate because the Supreme Court of Missouri should be allowed to interpret the Amendment to Article VIII and possibly resolve the alleged ambiguities.

I agree that Missouri courts are the best equipped to interpret the Missouri Constitution. I also agree with plaintiff [sic] that in his Complaint, plaintiff claims that the Article VIII Amendment is ambiguous and vague. For instance, plaintiff complains that Sections 17-19 of Article VIII leave unclear what acts a legislator must perform or pledge to perform in support of a term limits amendment in order to avoid having the negative designation placed next to his name on the ballot. Complaint ¶¶ 39-40. Plaintiff alleges that Sections 17-19 of Article VIII fail to state with particularity how a legislator is supposed to act in specific situations. For example, the Amendment is silent on how the legislator must vote if the proposed term limits amendment set forth in Article VIII, Section 16, has been proposed for a vote but then amended. *Id.* ¶ 41. Plaintiff also alleges that under Section 19, it is unclear what the Secretary of State's obligations are in considering "timely submitted public comments." *Id.* ¶ 43.

Despite plaintiff's claims that the Article VIII Amendment is ambiguous and unconstitutionally vague, however, *Pullman* abstention is not appropriate in this case. First, defendant has not proffered any reasonable limiting construction of the Amendment to Article VIII that would resolve the federal constitutional issues in this case. Second, abstention is not proper where a plaintiff makes a facial challenge to a state statute on First Amendment grounds.

In Counts I and V, plaintiff claims that the State of Missouri lacks the power to impose the restrictions on candidacy for Congress provided in the Article VIII Amendment because

imposed restrictions on candidacy for Congress violate Articles I and V of the United States Constitution. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 115 S. Ct. 1842 (1995) (holding that a state law violates Article I when it has the likely effect of disadvantaging a class of candidates for national office and has the sole purpose of indirectly creating qualifications in addition to those set forth in Article I). Despite any ambiguities in the Amendment to Article VIII, it is clear that the statute is intended to promote the passage of a constitutional amendment setting term limits. It is also clear that the Amendments empower the Secretary of State in some instances to place certain words describing the candidate's position on an issue next to a candidate's name on the ballot.

Plaintiff challenges in Counts I and V the State's power to attempt to require candidates for Congress to take a position on a particular issue. The constitutional questions plaintiff has raised in Counts I and V do not depend on the circumstances under which the Secretary will carry out her legislative directive to accomplish this legislative purpose. The essential issue raised by plaintiff is whether the State of Missouri has the power to legislatively encourage candidates for Congress to support term limits. Any uncertainty about how the Secretary of State is directed to go about advising the electorate of the candidate's position does not impact the essential issue.

Regardless of any clarifying interpretation by Missouri state courts, the issue involving the alleged violation of the United States Constitution would remain.

With regard to Counts II and III, where a plaintiff makes a facial challenge to a state law alleging that the state law abridges his freedom of expression, *Pullman* abstention is not appropriate. *Hill*, 107 S. Ct. at 2513. "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect [sic] the impermissible chilling of the very constitutional right he seeks to protect." *Id.* (quoting *Zwicker v. Koota*, 389 U.S. 241, 252, 88 S. Ct. 391, 397 (1967)).

In Count II, plaintiff alleges that the Article VIII Amendment is unconstitutionally vague. In Count III, plaintiff alleges that the Amendment to Article VIII seeks to require Missouri congressional candidates to take a specific position on term limits. Plaintiff asserts that this constitutes forced speech under the First Amendment. Until these issues are resolved, plaintiff faces a possible impermissible chilling of his First Amendment right to free speech by having to decide whether to run for Congress and face the requirements of Article VIII, as amended. If he decides to run, plaintiff would then have to decide whether to take the Term Limits Pledge or suffer the consequences for failure to take the pledge. Therefore, abstention here is improper.

Furthermore, "[i]n the case where applicability of a statute is uncertain, abstention is often proper, while in the case where the vagueness goes to the obligations imposed by statute, it is not, since a single state construction often would not bring the challenged statute 'within the bounds of permissible constitutional certainty.'" *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 86 n.9, 95 S. Ct. 870, 876-77 n.9 (1975) (citation omitted).

In Count II, plaintiff's vagueness claims go to "the obligations imposed by" the Article VIII Amendment, and not whether the Amendment to Article VIII will govern his conduct if he becomes a candidate. There is no uncertainty that if Gralike runs for Congress, he will be asked to take the Term Limits Pledge and if he refuses, plaintiff runs the risk of having the Secretary of State add certain words after his name on the ballot. Because plaintiff's vagueness claims go to the obligations imposed by the amendments and not whether the amendments would apply to him, *Pullman* abstention is not proper.

Finally, with regard to Count IV, plaintiff claims that the jurisdictional provision in Section 21 of Article VIII violates the Supremacy Clause. However, defendant has not objected to federal jurisdiction based on Section 21. Not only do the parties agree that federal jurisdiction is proper in this case, but neither has offered a reasonable interpretation of Section 21 that the state court might

adopt which would preclude federal jurisdiction. Therefore, even if Section 21 is ambiguous, that section does not provide a basis to abstain in this case.

Therefore, *Pullman* abstention is not appropriate in this case.

E. Certification to the Missouri Supreme Court

As an alternative to abstention under *Pullman*, defendant suggests certification of the state law issues in this case to the Missouri Supreme Court. However, the Missouri Supreme Court has held that it does not have jurisdiction under the Missouri Constitution to render opinions on questions of law certified by federal courts. *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 108-09 (1990) (discussing the Missouri Supreme Court's order in *Zeman v. V.F. Factory Outlet, Inc.*, No. 72613 (Mo. July 13, 1990)). Therefore, certification of questions to the Missouri Supreme Court is impossible.

V. [sic] CONCLUSION

Accordingly, it is ORDERED that:

1) Defendant's Original Motion to Dismiss (Doc. No. 10), filed April 25, 1997, is denied as moot; and

2) Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (Doc. No. 29) is granted as to Count VI but denied in all other respects.

/s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
January 15, 1998

Supreme Court, U.S.
FILED
MAR - 8 2000

(2)

No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ARTHUR A. BENSON II*
GREGG LOMBARDI
ARTHUR BENSON & ASSOCIATES
Suite 1125, 1000 Walnut Street
Kansas City, Missouri 64106
(816) 842-7603

JONATHAN S. FRANKLIN
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5766

*Counsel of Record

Counsel for Respondents

2890

QUESTION PRESENTED

Whether the court of appeals correctly held unconstitutional an amendment to the Missouri Constitution requiring the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" to appear on the ballot next to the name of any congressional candidate deemed by a state official to have failed to support a state-favored term limits amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTERSTATEMENT	3
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO CONFLICT WARRANTING THIS COURT'S REVIEW	5
II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI AMENDMENT IS UNCONSTITUTIONAL	11
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
Cases:	
American Fed. of Labor-Congress of Indus. Orgs. v. *Eu*, 686 P.2d 609 (Cal. 1984)	13
Anderson v. *Martin*, 375 U.S. 399 (1964)	17
Barker v. *Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998)	*passim*
Bennett v. *Spear*, 520 U.S. 154 (1997)	11
Blodgett v. *Campbell*, 508 U.S. 1301 (1993)	9
Bramberg v. *Jones*, 978 P.2d 1240 (Cal. 1999)	*passim*
Brown v. *Hartlage*, 456 U.S. 45 (1982)	18
Burson v. *Freeman*, 504 U.S. 191 (1992)	18
Donovan v. *Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997)	5, 12, 14
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	11
Hawke v. *Smith*, 253 U.S. 221 (1920)	12
Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)	15, 17
In re Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996)	6, 12, 15
Jones v. *United States*, 119 S. Ct. 2090 (1999)	11
Kimble v. *Swackhamer*, 439 U.S. 1385 (1978)	8, 9
League of Women Voters of Maine v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997)	*passim*
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	17
Meyer v. *Grant*, 486 U.S. 414 (1988)	18
Miller v. *Moore*, 169 F.3d 1119 (8th Cir. 1999)	*passim*
Morrisey v. *State of Colorado*, 951 P.2d 911 (Colo. 1998)	5, 15
Riley v. *National Fed. of Blind of N.C., Inc.*, 487 U.S. 781 (1988)	15, 17
Rosenberger v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)	18
Simpson v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997)	*passim*
State of Montana v. *Waltermire*, 691 P.2d 826 (Mont. 1984)	13

TABLE OF AUTHORITIES—Continued

	Page
Timmons v. *Twin Cities Area New Party*, 520 U.S. 351 (1997)	18, 19
Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994)	18
U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995)	1, 2, 19
West Virginia State Bd. of Ed. v. *Barnette*, 319 U.S. 624 (1943)	15, 16
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10
Wooley v. *Maynard*, 430 U.S. 705 (1977)	15, 16
Constitutional Provisions:	
Qualifications Clauses, U.S. Const., Art. I, § 2, cl. 2, § 3, cl. 3	1
Speech and Debate Clause, U.S. Const., Art. I, § 6, cl. 1	21
U.S. Const., Art. V	6
Mo. Const., Art. VIII, § 16	3
Mo. Const., Art. VIII, § 17(1)	3
Mo. Const., Art. VIII, § 17(2)	3
Mo. Const., Art. VIII, § 17(2)(a)-(h)	4
Mo. Const., Art. VIII, § 18(1)	4
Mo. Const., Art. VIII, § 18(3)	4
Mo. Const., Art. VIII, § 19(1)	4
Rule:	
S. Ct. R. 14.1(a)	11
Other Authorities:	
Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988)	14
Benjamin J. Cluff, *Federal Term Limits in Idaho: Once, Twice, Three Times Unconstitutional?*, 36 Idaho L. Rev. 119 (1999)	20

TABLE OF AUTHORITIES—Continued

	Page
Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533 (1999)	2
Philip B. Kurland & Ralph Lerner, eds., 5 *The Founders' Constitution* (1987)	14
Robert L. Stern, *et al.*, *Supreme Court Practice* (7th ed. 1993)	10

IN THE

Supreme Court of the United States

No. 99-929

REBECCA MCDOWELL COOK,
Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Donald J. Gralike and Mike Harman respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

In *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), this Court held that the Constitution forbids a State from imposing "term limits" on Members of Congress because a State may not add to the three qualifications for congressional service stated in the Qualifications Clauses, *i.e.*, minimum age, national citizenship, and state inhabitancy. *See* U.S. Const., Art. I, § 2, cl. 2; *id.* § 3, cl. 3. The Court advised that congressional term limits, if they are to be adopted, "must come not by legislation adopted by either

Congress or by an individual State, but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V." *Thornton*, 514 U.S. at 837 (footnote omitted).

This case involves a patently unconstitutional effort by the State of Missouri to circumvent *Thornton* by dictating that all candidates for Congress support a constitutional term limits amendment favored by the State and by attaching pejorative ballot labels next to the names of those candidates who hold different views. A year after *Thornton* was decided, Missouri voters in November 1996 adopted an amendment to the Missouri Constitution ("the Missouri Amendment") requiring that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appear on the ballot next to the name of any congressional candidate deemed by a state official to have failed to support term limits of the sort and in the manner prescribed in the Missouri Amendment. Pet. App. A2-A4.

Similar measures were either proposed or voted on in more than a dozen other states during the 1996 election cycle. *Id.* at A2 n.3. "The term limits advocacy group responsible for proposing these notations calls them 'Informed Voter' ballot notations; opponents refer to them as 'Scarlet Letter' notations." Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533, 1537 (1999). Eight of the ballot label initiatives proposed or adopted in 1996 have been challenged in court, and all eight—including the Missouri Amendment—have been invalidated on constitutional grounds. *See* Pet. App. A2 n.3 (citing cases). In 1998, another similar initiative, Proposition 225, was "narrowly adopted" in California, and it, too, was subsequently held unconstitutional. *Bramberg* v. *Jones*, 978 P.2d 1240, 1241 (Cal. 1999).

As the court of appeals held below, such Scarlet Letter laws contravene not one, but as many as four, separate constitutional provisions. Indeed, the unconstitutionality of such laws is so clear that even some of their supporters have given up defending them. In California, in the official ballot pamphlet distributed to voters, the *proponent* of Proposition 225, "acknowledged that measures similar to Proposition 225 had been found invalid by a number of other courts in other jurisdictions" and actually "urged voters *not* to vote in favor of Proposition 225." *Id.* (emphasis in original).

Measures such as the Missouri Amendment proposed or enacted in nine States have now been declared unconstitutional. No such measure has been upheld against constitutional challenge. The Court should therefore decline to expend its scarce resources reviewing a law that has been unanimously condemned by every court to have reviewed its kind.

COUNTERSTATEMENT

The Missouri Amendment proposes and sets forth the text of a term limits amendment to the United States Constitution that would limit Senators to two terms and Members of the House of Representatives to three terms. *See* Mo. Const., Art. VIII, § 16. The Missouri Amendment then "instruct[s]" every member of the State's congressional delegation "to use all of his or her delegated powers to pass the" proposed constitutional amendment. *Id.* § 17(1).

If a Senator or Representative from Missouri fails to comply with this instruction, the Missouri Amendment provides that when he or she next stands for election the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be printed on the ballot next to the candidate's name in both the primary and general election. *Id.* § 17(2). Under the Amendment, this label is to appear beside the candidate's name if he or she (a) fails to vote in favor of the proposed term limits amendment; (b) fails to second the

proposed amendment if a second is lacking; (c) fails to propose or otherwise bring to a vote the proposed amendment; (d) fails to vote in favor of bringing the proposed amendment before committee or subcommittee; (e) fails to vote against all measures to delay, table, or otherwise prevent a vote by the full body; (f) fails to vote against any amendment allowing longer terms than the proposed amendment; (g) sponsors or cosponsors any proposal to increase term limits beyond those in the proposed amendment; or (h) fails to ensure that all votes on the proposed amendment are recorded and made publicly available. *See id.* § 17(2)(a)-(h).

The Missouri Amendment also provides that non-incumbent candidates for Congress who decline to take a term limits "pledge" shall have the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed beside their names on every primary and general election ballot. *Id.* § 18(1). The pledge states: "I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." *Id.* § 18(3).

Petitioner—Missouri's Secretary of State—is responsible for determining whether incumbent and non-incumbent candidates for Congress shall have the "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" label placed next to their names. *See id.* § 19(1).

Respondent Donald J. Gralike, who was a candidate for Congress from Missouri's Third District in 1996, filed suit challenging the Missouri Amendment. The District Court granted summary judgment in Gralike's favor, holding that the Missouri Amendment violated three provisions of the United States Constitution: the Qualifications Clauses of

Article I, Article V, and the First Amendment. *See* Pet. App. A5, A33-A34. While the case was on appeal, respondent Mike Harman, a candidate for the Missouri Seventh District seat, intervened as an appellee. *See* Pet. ii.

The Eighth Circuit affirmed. The court of appeals held that Gralike was "entitled to judgment as a matter of law because the Missouri Amendment violates the First Amendment, the Speech and Debate Clause, the Qualifications Clause, and Article V of the United States Constitution." Pet. App. A22. Judge Hansen "readily concur[red]" with the holding that "the labeling provisions (§§ 17, 18, and 19) of the Missouri Amendment [are] in violation of the Constitution" but dissented in part on the narrow issue of whether part of the Missouri Amendment should be severed from the unconstitutional remainder. *Id.* at A23.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WARRANTING REVIEW BY THIS COURT.

As the Eighth Circuit observed (Pet. App. A2 n.3), and as petitioner concedes (Pet. 13-14), every court to have considered a measure similar to the Missouri Amendment has invalidated it on federal constitutional grounds and, in some cases, on state constitutional grounds as well.[1]

---

[1] *See Miller* v. *Moore*, 169 F.3d 1119 (8th Cir. 1999) (Nebraska Article XVIII violates Article V and right to vote); *Barker* v. *Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998) (South Dakota Initiated Measure 1 violates Article V, First Amendment, Speech and Debate Clause, and Due Process Clauses); *League of Women Voters of Maine* v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997) (Maine Congressional Term Limits Act of 1996 violates Article V); *Donovan* v. *Priest*, 931 S.W.2d 119 (Ark. 1996) (proposed Arkansas Amendment 9 violates Article V), *cert. denied*, 519 U.S. 1149 (1997); *Bramberg* v. *Jones*, 978 P.2d 1240 (Cal. 1999) (California Proposition 225 violates Article V); *Morrisey* v. *State of Colorado*, 951 P.2d 911 (Colo. 1998) (Colorado Amendment 12

Although the Eighth Circuit concluded that the Missouri Amendment violates four separate constitutional provisions, the only conflict petitioner alleges concerns the court's holding that the Amendment violates Article V. *See* Pet. 12. As to the court's other three holdings, petitioner claims no conflict but states only that "the Court should grant the petition because of the importance of the issues involved." *Id.* On the Article V holding, petitioner claims that the Eighth Circuit's opinion in this case conflicts with an opinion of "the Supreme Court of Idaho, an opinion authored by then Justice Rehnquist and an earlier opinion of the Eighth Circuit." *Id.* There is, however, no conflict between the Eighth Circuit's holding that the Missouri Amendment violates Article V and any of these three decisions.

Article V prescribes the exclusive methods by which the Constitution may be amended. First, Congress may propose an amendment on the two-thirds vote of each House. Second, Congress must call a convention for proposing amendments if the legislatures of two-thirds of the States apply for one. In either case, a proposed amendment becomes valid when ratified by the legislatures of three-fourths of the States or conventions held in three-fourths of the States. *See* U.S. Const., Art. V. Thus, as the Eighth Circuit noted, "Article V specifically delegates the amendment process to legislative bodies, not the voters." Pet. App. A20. *See also Miller*, 169 F.3d at 1123 ("the voters in an individual state have, at best, a very limited role in the amendment process"); *League of Women Voters*, 966 F. Supp. at 59 ("It is left to Congress and the state legislatures to propose and ratify amendments to the Constitution."). The Eighth Circuit held here that "[v]oter

---

violates Article V and Guarantee Clause); *Simpson* v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (Idaho Proposition 4 violates Speech and Debate Clause, First Amendment, and Idaho Constitution); *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (Oklahoma Initiative Petition No. 364 violates Article V and Oklahoma Constitution).

initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V." Pet. App. A22. The Missouri Amendment, said the court, was an impermissible "attempt by the voters to directly influence the Article V process by directing Senators and Representatives from Missouri to support and pursue the proposal and ratification of a term limits amendment to the United States Constitution." *Id.*

a. There is no conflict between the decision below and *Simpson* v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997). There, the Idaho Supreme Court held that Idaho's Proposition 4 violated the Speech and Debate Clauses of the United States and Idaho Constitutions insofar as it punished incumbent congressional candidates with the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS." *See id.* at 1374-75. The court also held that Proposition 4 violated the free speech provision of the Idaho Constitution to the extent that it subjected non-incumbents to the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *See id.* at 1375-76. Thus, far from being in conflict, *Simpson* and the decision below both invalidated the ballot labeling provisions before them.

After invalidating the labeling provisions, the Idaho Supreme Court went on to hold that Proposition 4's instruction provision—*i.e.*, the provision instructing Idaho's congressional delegation to use all their powers to pass the proposed term limits amendment—did not violate Article V. The court reasoned that the labeling provisions could be severed from the rest of Proposition 4, and that, absent of the compulsion of the labels, the instruction provision would be nothing but a "nonbinding, advisory initiative." *Id.* at 1376. Therefore, the court held that "*[s]tanding alone*, the instructions concerning the proposed amendment do not violate Article V." *Id.* (emphasis added).

Although the Eighth Circuit in this case invalidated the Missouri Amendment's instruction provision on Article V grounds, there is no conflict between its decision and *Simpson*. Like the Eighth Circuit, the Idaho Supreme Court held the labeling provisions unconstitutional, and it was only because of that holding that the *Simpson* court construed the instruction provision as nonbinding and thus permissible. Here, the Eighth Circuit considered both the labeling and instruction provisions together, and held that both provisions were unconstitutional. Both courts, however, invalidated the mechanism through which Idaho and Missouri sought to coerce legislators into adopting a term limits amendment outside of the prescribed Article V procedures. The results of those cases are therefore entirely consistent.

Moreover, it is not surprising that the Eighth Circuit considered the labeling and instruction provisions together, for petitioner did not ask that court—and does not ask this Court—to take the two-step approach of the *Simpson* court to the Missouri Amendment. That is, petitioner does not suggest that the labeling provisions should be judged first, and if those provisions are invalidated, they should be severed and the instruction provision considered in isolation. Petitioner therefore has waived any argument that the approach taken in *Simpson* should have been, or should be, taken here.

b. Nor does the Eighth Circuit's decision conflict with the opinion of then-Justice Rehnquist, acting as Circuit Justice, in *Kimble* v. *Swackhamer*, 439 U.S. 1385 (1978). That opinion, of course, is not authoritative as to the merits of the Article V issue discussed in that case—as Justice Rehnquist himself recognized. *See id.* ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits."); *accord Blodgett* v. *Campbell*, 508 U.S. 1301, 1303-04 (1993) (O'Connor, J., in chambers). But even if it were, *Kimble* is wholly consistent with the result reached in this case.

In *Kimble*, "the Nevada legislature enacted a statute requiring the submission of an advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature." 439 U.S. at 1386. Refusing to preliminarily enjoin the statute, Justice Rehnquist rejected the argument that it violated Article V by injecting "citizen participation in the amendatory process." *Id.* at 1387. Justice Rehnquist so concluded because the vote to be taken was merely a "nonbinding, advisory referendum." *Id.* at 1388. There is no conflict between *Kimble* and this case because, as the Eighth Circuit held, the Missouri Amendment was "far more than an advisory, non-binding show of voters' opinion on term limits." Pet. App. A21. If a candidate declines to support the state-favored term limits amendment, he or she will be severely penalized through highly pejorative ballot labels placed next to his or her name. Thus, the Eighth Circuit itself denied that its decision was inconsistent with *Kimble*, explaining that "unlike the Nevada legislators in *Kimble*, members of Missouri's congressional delegation are not free to disregard the instruction embodied in the Amendment." Pet. App. A21-A22.

c. Finally, there is not a conflict between the Eighth Circuit's decision in this case and the Eighth Circuit's prior decision in *Miller* v. *Moore*, 169 F.3d 1119 (8th Cir. 1999), that warrants review. In *Miller* the Eighth Circuit held that the labeling provisions of Nebraska Amendment XVIII violated Article V and the right to vote. Thus, the two panels *agreed* as to unconstitutionality of ballot labeling provisions such as those at issue here. The decision below and *Miller* differ only in that in *Miller* the Eighth Circuit concluded that Section 1 of the Nebraska Amendment, in which was "establish[ed] as the 'official position of the citizens and State of Nebraska' that its elected officials should enact a specific

term limits amendment," was severable from the invalidated portions of the Amendment. *Id.* at 1126. In this case, the Eighth Circuit refused to sever Section 15 of the Missouri Amendment—the Amendment's preamble—and Section 16—which contains the text of the proposed term limits amendment. *See* Pet. App. A22-A23 n.12. There is no conflict, however, because Sections 15 and 16 of the Missouri Amendment are quite different from Section 1 of the Nebraska Amendment. For one thing, the Missouri Amendment does not contain language regarding the "official position" of the citizens and State of Missouri.

Furthermore, the Eighth Circuit's refusal to sever part of the Missouri Amendment is not the sort of conflict that would warrant review by this Court. To begin with, that issue, as the Eighth Circuit said, is as much a "jurisprudential" issue as a constitutional issue. *Id.* The Eighth Circuit decided against severance in this case because it would involve "micro-management of the Missouri Constitution [and] would entangle this court too much in state law issues." *Id.* Furthermore, no matter how the severance issue is resolved, it does not affect the invalidity of the labeling and instruction provisions, which both the court below and *Miller* agreed were unconstitutional. Therefore, the severance issue is of little consequence. Had the Eighth Circuit in this case severed Sections 15 and 16 of the Missouri Amendment, all that would have been left was a proposed constitutional amendment lacking any provisions for securing its adoption. Whether the Eighth Circuit should have permitted the precatory provisions of the Missouri Amendment to remain in effect is not a question that warrants further review.

In any event, any intracircuit conflict between the Eighth Circuit's own decisions is a matter for the Eighth Circuit, not this Court, to resolve in the first instance. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* 176 (7th ed. 1993) ("Ordinarily, a conflict between decisions rendered

by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari."). Finally, even if the severance issue warranted review—and it does not—that narrow issue is not specifically addressed in the petition and is not "fairly included" within the scope of the questions presented therein. S. Ct. R. 14.1(a).

In sum, there is no conflict between the decision below and *Simpson* since the Eighth Circuit and the Idaho Supreme Court agreed on the unconstitutionality of the labeling provisions; there is no conflict with *Kimble*, as the Eighth Circuit itself recognized, since the Missouri Amendment, unlike the Nevada statute in *Kimble*, is not "nonbinding" or "advisory"; and any alleged conflict with the Eighth Circuit's *Miller* decision on the severance issue does not warrant review, if that issue has even been presented for review.

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI AMENDMENT IS UNCONSTITUTIONAL.

The Eighth Circuit held that the Missouri Amendment violates four separate constitutional provisions—the First Amendment, the Qualifications Clauses, Article V, and the Speech and Debate Clause. The court therefore did not reach respondent Gralike's additional argument that the Missouri Amendment is unconstitutionally vague. *See* Gralike's C.A. Br. 44-49 (citing, *inter alia*, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972)). Thus, were the judgment below to be reversed, this Court would have to conclude that the Eighth Circuit erred on *all four* of these issues—and also that the Missouri Amendment is not void for vagueness. *See Jones* v. *United States*, 119 S. Ct. 2090, 2106 (1999) ("As the prevailing party, [respondent] is entitled to defend the judgment on any ground that it properly raised below."); *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) (a respondent is entitled "to defend the judgment on any ground supported by the record" even if "not reached below"). As shown below, however, the Eighth Circuit—like every court before it—had ample

grounds for holding the Missouri Amendment unconstitutional. Any one of the court's four independent holdings is sufficient by itself to demonstrate that this case does not present unsettled issues warranting this Court's intervention. Taken together, these multiple holdings clearly warrant denial of the petition.

a. The Eighth Circuit correctly held that the Missouri Amendment violates Article V. Indeed, every court to consider a measure similar to the Missouri Amendment has concluded that the measure violated Article V. *See Miller*, 169 F.3d at 1123-24; *Barker*, 3 F. Supp. 2d at 1092-95; *League of Women Voters*, 966 F. Supp. at 55-63; *Donovan*, 931 S.W.2d at 122-128; *Bramberg*, 978 P.2d at 1246-52; *Morrisey*, 951 P.2d at 914-916; *In re Initiative Petition No. 364*, 930 P.2d at 191-193. As noted above, the Idaho Supreme Court found no Article V violation only because it had already held unconstitutional the labeling provisions through which Idaho Proposition 4 was to be enforced.

Like the courts cited above, the Eighth Circuit held that "[v]oter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V." Pet. App. A22. These holdings follow directly from this Court's Article V precedents, including *Hawke* v. *Smith*, 253 U.S. 221 (1920), in which this Court invalidated a provision of the Ohio Constitution subjecting to popular referendum the state legislature's ratification of amendments to the United States Constitution. In *Bramberg*, the California Supreme Court explained the invalidity under Article V of measures such as the Missouri Amendment. As the court explained, Article V

> vests the power to propose and ratify amendments to the United States Constitution solely in deliberative bodies—Congress, state legislatures, or constitutional conventions—and does not authorize such amendments either to be mandated or defeated by a direct vote of a state's electorate through an initiative or referendum. Because

> Proposition 225 both directly instructs, and indirectly attempts to coerce, California's congressional and state legislators in the exercise of their federal constitutional function of proposing and ratifying amendments to the United States Constitution, we conclude that the proposition clearly conflicts with the amendment process authorized by Article V and is therefore unconstitutional. [978 P.2d at 1241-42.]

Cf. State of Montana v. *Waltermire*, 691 P.2d 826 (Mont. 1984) (invalidating on Article V grounds voter initiative requiring state legislators to apply to Congress to call a convention to consider a balanced budget amendment to the Constitution or else remain in session indefinitely without pay); *American Fed. of Labor-Congress of Indus. Orgs.* v. *Eu*, 686 P.2d 609 (Cal. 1984) (same).

Petitioner recites a lengthy "History of Citizen Instructions" derived from a forthcoming law review article written by a professor who filed an *amicus* brief in support of petitioner in the court below. Pet. 14-17. This history is largely irrelevant, however, because—as petitioner herself admits—there is little or no historical practice supporting the use of disparaging ballot labels to enforce citizens' instructions to their congressional representatives. *See id.* at 17 n.14. Furthermore, directly contrary to petitioner's historical account, the Eighth Circuit in *Miller* concluded that "[a]n examination of the constitutional history behind popular 'instructions' to legislators gives us further cause to doubt the constitutionality of Article XVIII." 169 F.3d at 1124. The court explained:

> In 1789, the House of Representatives rejected a proposed "right to instruct Representatives" that would have been one of the rights specified in the First Amendment. James Madison and his fellow Federalists, in particular, feared that popular instructions to legislators would destroy legislative debate and make compromise impossible. They feared, in addition, that a right to instruct,

> whether or not legally binding on legislators, would convey to the people the idea that they had a right to control the debates of Congress, thus undermining the Federalists' scheme of representative government. [*Id.* (citing Philip B. Kurland & Ralph Lerner, eds., 5 *The Founders' Constitution* 200-206 (1987), and Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1058-60 (1988)).]

Thus, even if it were the Court's role to engage in abstruse academic debates where the Court's precedents provide a ready answer, it is far from clear that history is unequivocally on petitioner's side.

Relying on *Kimble* and *Simpson*, petitioner asserts that the Missouri Amendment "does not operate as a handicap on candidates" and "is by its term non-binding." Pet. 20, 21. Against petitioner's assertion, however, is the considered judgment of four federal and four state supreme courts—not to mention common sense—that the use of pejorative ballot labels such as "DISREGARDED VOTER'S INSTRUCTION ON TERM LIMITS" is inherently coercive.[2] Petitioner even

---

[2] *See* Pet. App. A21 ("the Missouri Amendment is far more than an advisory, non-binding show of voters' opinion on term limits"); *Miller*, 169 F.3d at 1124 ("Nebraska's Article XVIII represents a clear attempt to coerce or bind legislators into exercising their Article V powers to pass a term limits amendment" and is not "merely an advisory statement of popular opinion that legislators are free to ignore"); *Barker*, 3 F. Supp. 2d at 1094 ("The ballot labels at issue here are not neutral. * * * These labels coerce congressional candidates to follow the dictates of Initiated Measure 1 regardless of the merits of the term limits proposal contained within it."); *League of Women Voters*, 966 F. Supp. at 60 (argument that the Maine Act "is not coercive but rather provides nonbinding instructions from Maine's voters to their legislators * * * raises naivete to new heights"); *Donovan*, 931 S.W.2d at 127-128 (proposed Arkansas Amendment 9 is "binding on the legislators in an extortive manner as failure to heed the amendment's instructions will result in their threatened potential political death"); *Bramberg*, 978 P.2d at 1249 ("unlike the measure at issue in *Kimble*, Proposition 225 clearly is not a purely advisory measure"); *Morrisey*, 951 P.2d at 916 (rejecting argument that Colorado Amendment 12's "ballot designations are merely informational and resemble other permissible designations such as the candidate's party affiliation"); *In re Initiative Petition No. 364*, 930 P.2d at 193 (Oklahoma initiative petition "would be neither nonbinding nor purely advisory in its federal aspects. * * * This is an express mandate from the people to the Legislature to take a specific action.").

admits (albeit half-heartedly) that the DISREGARDED VOTER'S INSTRUCTION ON TERM LIMITS label "may have some risk, despite its relatively nebulous nature, of leaving a negative impression with voters." Pet. 20-21 n.18. As eight courts have concluded, there is no other impression that could possibly be left.

b. The Eighth Circuit also correctly held that the Missouri Amendment violates the First Amendment. *See* Pet. App. A6-A14. *See also Barker*, 3 F. Supp. 2d at 1095 ("it is hard to imagine a more chilling impact on political speech than that created by Initiated Measure 1"); *Simpson*, 955 P.2d at 1375-76 (Idaho Proposition 4 violates free speech provision of Idaho Constitution). This Court has consistently interpreted the constitutional guarantee of freedom of speech to include the right *not* to speak. *See, e.g.*, *Riley* v. *National Fed. of Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943); *see also Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (compelled association case). As the Court said in *Riley*, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." 487 U.S. at 796-797 (emphasis in original).

The Missouri Amendment compels speech in two ways. *See* Pet. App. A8. First, it compels candidates to speak in favor of term limits by threatening them with the ballot labels if they do not. Non-incumbents, in particular, are forced to speak since they must recite the term limits "pledge" to avoid being labeled. *See Barnette* (impermissible to require recitation of pledge of allegiance). Second, if an incumbent is deemed to have failed to support the proposed term limits amendment, or if a non-incumbent refuses to take the term limits pledge, a label will appear on the ballot next to his or her name, thus ascribing to the candidate a position and statement he or she did not wish to make. *See Wooley* (requirement that state motto "Live Free or Die" appear on license plates impermissibly ascribed view to motorists). And as the Eighth Circuit correctly noted, "[t]he point of view the labels ascribe to candidates may not even be accurate. * * * Regardless of a candidate's opinion about term limits in general, if the candidate does not support the specific limit prescribed in the Missouri Amendment, * * * he or she will be branded as an opponent to the Missouri Amendment and to the wishes of the voters of Missouri." Pet. App. A12 n.7.

Petitioner argues that the Missouri Amendment does not compel speech but rather that "the people simply comment on the silence or behavior of their congressional candidates." Pet. 26. The Eighth Circuit rightly concluded, however, that "the labels do far more than advise voters of a candidate's opposition to term limits" since they are "phrased in such a way as to give (and we believe are calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. * * * Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress." Pet. App. A9. *Accord Barker*, 3 F. Supp. 2d at 1096 ("these ballot labels essentially

brand the candidates as unworthy of public office"). And the labels "are particularly harmful because they appear on the ballot, an official document produced by the state" and thus "appear to be an official denunciation of certain candidates." Pet. App. A10.

Petitioner argues that the Missouri Amendment "does not compel any speech" because it involves no "threat of criminal prosecution." Pet. 26. But as the Eighth Circuit correctly noted, the compelled speech doctrine "has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction." Pet. App. A8. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (statute requiring newspaper to print reply of candidate criticized by the paper violates First Amendment "[e]ven if a newspaper would face no additional costs to comply with" the law); *see also Riley* (non-criminal case); *Hurley* (same). Petitioner cites no case to the contrary.

The Missouri Amendment actually goes even further than compelling speech. It penalizes legislators and candidates—in a viewpoint discriminatory manner—for adopting substantive views contrary to those expressed by a majority of Missouri voters at one particular point in time. The Amendment attaches pejorative labels to the names of those candidates who hold a governmentally-disfavored position on the term limits issue, and only that issue. And "the labels appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label." Pet. App. A10 n.6. *See Barker*, 3 F. Supp. 2d at 1094 (the ballot labels "are disseminated to voters at a time when voters are most susceptible to persuasion—while they are in the ballot box—and at a time when candidates are most vulnerable"); *see also Anderson* v. *Martin*, 375 U.S. 399, 402 (1964) (law requiring ballots to designate candidate's race puts a "label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast"). Missouri has placed the weight of the State

squarely on one side of a political debate in a heavy-handed effort to influence the outcome of elections. The First Amendment was intended precisely to prohibit such governmental interference with the free flow of political discourse.

Petitioner argues that the Eighth Circuit "failed to apply the proper test" under the First Amendment. Pet. 26. The Eighth Circuit applied strict scrutiny to the Missouri Amendment, and was right to do so. Not only does the Missouri Amendment compel and penalize political speech connected to campaigns for public office—the sort of speech to which maximum First Amendment protections apply—but the Amendment is also content-based (it focuses only on term limits) and even viewpoint-based (it is pro-term limits) in its regulation of political speech. There can be no doubt that strict scrutiny applies to such a law. *See Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) (First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office") (quotation marks omitted); *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988) (First Amendment is "at its zenith" in the area of political speech); *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (applying strict scrutiny to "content-based restriction on political speech"); *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) (content-based "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny") (citing *Riley* and *Barnette*); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination."). *See also Barker*, 3 F. Supp. 2d at 1095 (applying strict scrutiny to South Dakota Initiated Measure 1).

Finally, petitioner argues that the citizens of Missouri have their own First Amendment right to communicate on the ballot information about the candidates' position on term limits. *See* Pet. 25. In *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351 (1997), however, this Court rejected a

claimed right "to us[e] to ballot to communicate to the public" and "to send a particularized message" to the voters, *id.* at 362, 363, explaining that "[b]allots serve primarily to elect candidates, not as fora for political expression." *Id.* at 363. The ballot is not, of course, the only avenue of communication open to those Missourians who support term limits. Term limit supporters remain free "to communicate ideas to voters and candidates through [their] participation in the campaign" itself. *Id.* Petitioner's approach "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Id.* at 365.

c. As the third ground for invalidating the Missouri Amendment, the Eighth Circuit held that, under this Court's decision in *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), the Amendment violates the Qualifications Clauses of Article I. This holding, too, presents no important unsettled issue warranting this Court's review.

Although the Missouri Amendment does not directly prohibit a term-limited candidate from running for or serving in Congress, neither did the Arkansas Amendment invalidated in *Thornton*. The Arkansas Amendment provided that term-limited congressional candidates could not have their names appear on the ballot, but it permitted such candidates to run as write-in candidates and to serve if elected. *See id.* at 828. This Court, however, rejected the argument "that only a legal bar to service creates an impermissible qualification." *Id.* "In our view," said the Court, "Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." *Id.* at 829. The Court therefore "h[e]ld that a state amendment is unconstitutional when it has the *likely effect* of handicapping a class of candidates and has the *sole purpose* of creating additional qualifications indirectly." *Id.* at 836 (emphasis added).

Petitioner agrees that this is the applicable test of the Missouri Amendment's constitutionality under the Qualifications Clauses; she disputes only the Eighth Circuit's application of the *Thornton* test to the Missouri Amendment. *See* Pet. 22-23. There is no need for this Court to review the Eighth Circuit's application of that test on the facts of this case to invalidate the Missouri Amendment.

The Eighth Circuit held that the Missouri Amendment failed the *Thornton* test. The court concluded, first, that the labeling provisions of the Missouri Amendment would have the likely effect of handicapping "a distinct class of candidates—those who oppose term limits, refuse to take the term limits pledge, or fail to do one or more of the actions prescribed by the Amendment while serving in Congress," Pet. App. A17-A18, and, second, that "adding the term limit qualification is the sole purpose of the Missouri Amendment." *Id.* at A18. *See also* Benjamin J. Cluff, *Federal Term Limits in Idaho: Once, Twice, Three Times Unconstitutional?*, 36 Idaho L. Rev. 119, 121 (1999) ("In effect, these [ballot label] laws are an attempt to circumvent the *U.S. Term Limits* decision.").

Petitioner disputes that the labels would have the likely effect of handicapping a candidate. *See* Pet. 23. But the Eighth Circuit quite properly concluded that labels would "cast doubt on labeled candidates' ability to represent constituents, since the labels state that labeled candidates ignore their constituents' wishes." Pet. App. A18. Petitioner also argues that the intent of the Missouri Amendment was not to add a qualification for Congress but "to amend the Constitution and for that amendment to create a limitation on congressional service." Pet. 23. This argument was previously made to the Eighth Circuit, and the court rejected it, saying that the fact that the Missouri Amendment seeks to add a term limits qualification "by compelling members of Congress from Missouri to initiate, pursue, and support the Article V amendment process does not change the analysis

under *U.S. Term Limits*, as it is still an indirect attempt to add a qualification to those listed in the Qualifications Clause." Pet. App. A18.

Given the undisputed lack of any conflict on this issue, there is no cause for this Court to intervene in this case only to confirm that measures such as the Missouri Amendment—like the Arkansas Amendment considered in *Thornton*—have the purpose and likely effect of adding an additional qualification for federal office, in violation of the Qualifications Clauses.

d. The fourth and final ground on which the Eighth Circuit held the Missouri Amendment unconstitutional (insofar as it applied to incumbent candidates), was the Constitution's Speech and Debate Clause, U.S. Const., Art. I, § 6, cl. 1. *See* Pet. App. A14-A18. Two other courts have agreed with that determination, *see Barker*, 3 F. Supp. 2d at 1096; *Simpson*, 944 P.2d at 1375, and petitioner cites no contrary Speech and Debate Clause cases arising in a factually similar context. In light of the unanimity of views, further review of this issue by this Court is unwarranted. It would also be an unnecessary exercise. Because of the Missouri Amendment's many other constitutional flaws, there is no need even to review the Eighth Circuit's Speech and Debate holding.

* * *

If the constitutionality of ballot label initiatives such as the Missouri Amendment was ever a burning issue, it is no longer. In each of the nine jurisdictions in which such a measure has been challenged, the measure has been found unconstitutional. In California, the last State to enact such a measure, the proponent of Proposition 225 actually urged the voters to cast their votes *against* the measure, explaining that " 'passage of this measure will likely result only in needless and costly litigation.' " *Bramberg*, 978 P.2d at 1047 (quoting the official ballot pamphlet). The proponent encouraged voters "instead to support another measure relating to con-

gressional term limits that the proponent indicated would be presented to the voters in the future." *Id.* Since the constitutionality of measures such as the Missouri Amendment has been unanimously rejected by state supreme courts and the lower federal courts, and since the term limits movement itself appears to have abandoned this front in the battle for term limits, further review of this matter by this Court clearly is unwarranted.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ARTHUR A. BENSON II*
GREGG LOMBARDI
ARTHUR BENSON & ASSOCIATES
Suite 1125, 1000 Walnut Street
Kansas City, Missouri 64106
(816) 842-7603

JONATHAN S. FRANKLIN
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5766

* Counsel of Record

Counsel for Respondents

Supreme Court, U.S.
FILED
MAR 21 2000
CLERK

(3)

No. 99-929

In the
SUPREME COURT OF THE UNITED STATES

Rebecca McDowell Cook,
Petitioner,

v.

Don Gralike,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. McADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

* Counsel of Record

10pp

TABLE OF AUTHORITIES

Cases:

Foster v. Love, 522 U.S. 67, 118 S.Ct. 464 (1997) 5

Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) 3

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 4

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 4

Constitutional Provisions:

U.S. Const. art. I, § 4, cl. 1 5

U.S. Const. art. V 5

U.S. Const. amend. IX 3

U.S. Const. amend. X 3

The Declaration of Independence para. 2 (U.S. 1776) 2

Mo. Const. art. VIII, §§ 15-22 . . . . . 2, 5

Mo. Const. art. VIII, § 17, cl. 1 5

Mo. Const. art. VIII, § 22 5

Other Authorities:

Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) 4

Phillip B. Kurland & Ralph Lerner, eds., 5 *The Founder's Constitution* 25 (1987) 4

Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125 (1983) 3

No. 99-929

In the
SUPREME COURT OF THE UNITED STATES

Rebecca McDowell Cook,

Petitioner,

v.

Don Gralike,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

Despite Respondent's claims to the contrary, the Petition for a Writ of Certiorari presents a significant conflict and issues of vital importance. It involves the right of the people to participate in and encourage the evolution of their government; a right which the Framers reserved to the people, but which the United States Court of Appeals for the Eighth Circuit has now denied to them. The abridgment of this fundamental right demonstrates the necessity of Court review.

1. In an attempt to defend the erroneous decision of the Eighth Circuit, Respondent attempts to minimize the importance of the issues presented in the Petition for a Writ of Certiorari.[1] The Petition presents the Court with the most fundamental issue in a representative democracy: the right of the people to participate in their own governance. It is this right the Eighth Circuit ignored by invalidating article VIII, §§ 15-22 of the Missouri Constitution. And it is this right the Court should restore to the people of Missouri.

Despite both the Respondent's and the Eighth Circuit's contentions to the contrary, our country's history is replete with examples of people participating in the development of their government.[2] In the Declaration of Independence itself, our Framers declared:

> We hold these truths to be self evident, . . . That whenever any Form of Government becomes destructive of these ends *it is the Right of the People to alter or to abolish it*, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence para. 2 (U.S. 1776) (emphasis added). In enacting the Constitution shortly after liberating the people of this nation from British tyranny, our forefathers surely did not intend to prevent future generations of Americans from peacefully exercising the "self evident" right to participate in the alteration their government.

The Eighth Circuit's opinion invalidating Missouri's instructional and informational provisions concerning term limits effectively eliminates the people's right to participate in the

---

[1] Brief Opp. *passim*.

[2] *See* Pet. at pp. 14-17.

evolution of their government. Only this Court can restore this blessing of liberty and return to the people their self-evident right to participate in their government.

2. In an attempt to justify the Eighth Circuit's decision to deprive the people of their right to participate in the evolution of their government, Respondent notes that "[i]n 1789, the House of Representatives rejected a proposed 'right to instruct Representatives' that would have been one of the rights specified in the First Amendment."[3] But standing alone, the mere rejection of this addition to the First Amendment proves nothing.[4]

Under our Constitution the absence of an expressly enumerated right does not mean the people lack that right or that the Framers intended to deny the people that right. Two provisions of the Constitution establish the opposite rule: Amendment IX provides that, "[t]he enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people," and Amendment X provides that, "[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. IX. And it is these provisions of the Constitution that serve as the best guide to what the Framers

---

[3] Brief. Opp. at p. 13 (*citing Miller v. Moore*, 169 F.3d 1119, 1124 (8th Cir. 1999).

[4] For a discussion of this point, *see* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125, 1133 (1983) ("[i]f [a proposed amendment] is rejected, the range of possibilities [for its rejection] is much wider. It may be rejected by some legislators because they disagree with its substance (but not necessarily the same substance). On the other hand, those who agree with the substance may nevertheless vote against it as a spurious or unnecessary attempt to clarify. Simple non-action, being consistent with many explanations in circumstances not calling for consensus, has no probative value for any purpose.").

intended.[5] In light of the text of the Ninth and Tenth Amendment, the Respondent's and the Eighth Circuit's arguments that the Framers intended to deny the people the right to instruct their representatives fails. Instead, the Framers reserved this right to the people. Accordingly, this Court should grant the Petition for a Writ of Certiorari and restore this right to the people.

3. In his response, Respondent contends that the Court's holding in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), prohibits the people from communicating to themselves on their own ballot.[6] This is a wholly incorrect reading of *Timmons*. In *Timmons*, the Court held that it was constitutionally sound for a state to curtail a political party's use of the ballot as a communicative tool. But the rule that a State may curtail an activity does not logically lead to the conclusion that a State must curtail an activity. The *Timmons* Court did not issue a mandate requiring States to stamp out any communication appearing on the ballot.

Nor would such a holding comply with the Constitution. Under our Constitution, it is the States who are granted "broad power to prescribe the 'Time, Place and Manner of holding elections for Senators and Representatives'" in the absence of Congressional action. *Timmons*, 520 U.S. at 358, quoting from *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217

---

[5] If we were to consider language the Framers considered and omitted, examine a proposal by James Madison and the rationale for its rejection. He proposed a prefix to the Constitution's preamble declaring "[t]hat the people have an indubitable, unalienable, and indefeasible right to reform or change their government . . . ." Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1057 (1988), citing Phillip B. Kurland & Ralph Lerner, eds., 5 *The Founder's Constitution* 25 (1987). This prefix was dropped from the Constitution because it was deemed redundant. "[T]he words, as they now stand, speak as much as it is possible to speak; it is a practical recognition of the right of the people to ordain and establish Governments, and is more expressive than any other mere paper declaration." (Remarks of Rep. Jackson of Georgia.) *Id.*

[6] Brief. Opp. at p. 18-19.

(1986).[7] The people of Missouri simply exercised the power to communicate with themselves about the actions of their elected officials. Congress has enacted no law prohibiting this type of communication. Hence, the Constitution's default provision, article I, § 4, cl. 1, which "invests the States with responsibility for the mechanics of congressional elections," controls. *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 466 (1997). Having chosen to communicate in a manner that has not been constitutionally prohibited, the People's right to communicate should prevail.

4. Respondent claims Petitioner waived any right to raise the Eighth Circuit's failure to sever the allegedly unconstitutional provisions of the Missouri Constitution from the provisions that raised no constitutional concern.[8] But like the Eighth Circuit before him, Respondent fails to take into consideration the provisions of the Missouri Constitution at issue. Article VIII, § 22 of the Missouri Constitution specifically contemplates severance of any unconstitutional portion of the amendment.[9] Petitioner has never suggested that any court is required to accept or reject this amendment as a whole. Rather, Petitioner has only suggested that no provision of the Missouri amendment violates the federal Constitution.

Further, Respondent fails to consider the import of Petitioner's "Questions Presented." By articulating four questions, the first of which is phrased in the disjunctive, Petitioner presented the severance issue. The Eighth Circuit held that article VIII, §§ 15-16 & 20-22 of the Missouri Constitution only ran afoul of article V of the United States Constitution.[10] By granting a writ of certiorari on

---

[7] Interestingly, Respondent never acknowledges or disputes the States' authority to regulate elections.

[8] Brief Opp. at 10-11.

[9] Pet. at p. 8.

[10] Pet. App. at A22-A23 (following the Eighth Circuit's reasoning, Mo. Const. art. VIII, § 17, cl. 1 would seem to only run afoul of Article V).

the first Question Presented, this Court would necessarily consider the Eighth Circuit's failure to sever the allegedly unconstitutional provisions from the Missouri Constitution.

In striking down the entire amendment, the Eighth Circuit gratuitously ignored the severability provision. It justified this by claiming it would not "micro-manage" the Missouri Constitution.[11] So instead of using a scalpel to excise the allegedly unconstitutional provisions from the Missouri Constitution, it used a gavel to crush the will of the people and unnecessarily declare unconstitutional an entire section of the Missouri Constitution. The Eighth Circuit's action bespeaks intolerance for the views articulated in the Missouri Constitution. The sovereign will of a free People as expressed in their constitution is entitled to great respect. Thus far, it has been accorded very little and only this Court can rectify this sad situation.

CONCLUSION

The Eighth Circuit's opinion stands the Constitution on its head. As construed by the Eighth Circuit, the Constitution's provisions concerning the enactment of amendments prohibit popularly enacted laws that leave the enactment provisions unaltered, the Qualifications Clauses prohibit provisions that do not add additional qualifications, the Speech and Debate Clause insulates politicians from potential electoral consequences, and the Free Speech Clause invalidates public communication. Only this Court can set the Constitution right.

For the reasons stated in this reply, coupled with those found in the petition, the Petition for Writ of Certiorari should be granted.

---

[11] Pet. App. at A23

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. McADAMS
Chief Counsel for Litigation
Counsel of Record
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

March, 2000

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

No. 99-929

In the
SUPREME COURT OF THE UNITED STATES

Rebecca McDowell Cook,
Petitioner,

v.

Donald J. Gralike and Mike Harman,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. McADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General

P.O. BOX 899
JEFFERSON CITY, MO 65102
(573) 751-3321
Counsel for Petitioner

**Counsel of Record*

ARTHUR A. BENSON II*
GREGG LOMBARDI
ARTHUR BENSON & ASSOCIATES
4006 CENTRAL AVE.
P.O. BOX 119007
KANSAS CITY, MO 64171-9007
(816) 531-6565

JONATHAN S. FRANKLIN
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20004-1109
(202) 637-5766
Counsel for Respondents

PETITION FOR CERTIORARI FILED: NOVEMBER 29, 1999
CERTIORARI GRANTED: APRIL 17, 2000

TABLE OF CONTENTS

	Page
District Court Docket Entries	1
Court of Appeals Docket Entries	2
First Amended Complaint	3
First Amended Answer	15
Declaration of Donald Gralike (September 5, 1997)	25
Plaintiff's Motion for Summary Judgment	27
Letter from Jeanne Jarrett to Rebecca M. Cook with attachment, September 22, 1996	29
Memorandum from June Striegel Doughty to The Honorable Gary Burton and The Honorable Ralph Monaco, March 14, 1997	34
Excerpts of transcript of deposition of Debbie Cheshire (December 18, 1997)	37
Excerpts of transcript of deposition of Rebecca McDowell Cook (December 18, 1997)	45
Declaration of Mike Harman (filed June 9, 1998)	69
Declaration of Donald Gralike (filed June 9, 1998)	70

United States District Court
Western District of Missouri

DOCKET ENTRIES

December 11, 1996–Complaint.

July 15, 1997–1st amended complaint for declaratory & inj relief.

August 7, 1997–First amended answer by defendant.

August 19, 1997–Motion by defendant Rebecca McDowell Cook to dismiss 1st amended cmp and suggs in support.

October 29, 1997–Motion by defendant Rebecca McDowell Cook to dismiss for failure to state a claim and suggs in support.

December 4, 1997–Memorandum of conf w/ counsel mailed on 12/10/97.

January 12, 1998–Motion by plaintiff Donald James Gralike for summary judgment.

January 15, 1998–Order by Judge D. B. Bartlett that dft's original mt to dism (doc #10), filed 4/25/97, is denied as moot; and 2) Defendant's Motion to dism pla's 1st amended cmp (doc no. 29, is gr as to cnt VI but denied in all other respects.

January 29, 1998–Order by Judge D. B. Bartlett granting motion to dismiss Count IV of first amd cmp for failure to state a claim [45-1] on Counts I, II, III, and V, dft's m for judgment on the pleadings is denied.

February 13, 1998–Motion by plaintiff Donald James Gralike for preliminary injunction.

February 18, 1998–Order by Judge D. B. Bartlett granting motion for summary judgment [59-1] 2) dft is permanently enjoined from implementing and enforcing Sections 15, 16, 17, 18, or 19 of Article VIII of the Missouri constitution. Terminating case.

February 19, 1998–Notice of Appeal by defendant from Dist. Court decision.

United States Court of Appeals
for the Eighth Circuit

DOCKET ENTRIES

February 20, 1998–Civil case docketed.

April 13, 1998–Brief filed - Brief of Appellant- Rebecca McDowell Cook.

April 29, 1998–Brief filed - Brief of Amicus-Curiae - Professor Kris W. Kobach on behalf of Rebecca McDowell Cook.

June 9, 1998–Motion of intervenor Mike Harman for leave to intervene on behalf of Donald Gralike.

June 10, 1998–Brief filed - Brief of Appellee - Donald James Gralike.

June 10, 1998–Brief filed - Brief of Amicus-Curiae - League of Women [Voters] on behalf of Donald James Gralike.

July 8, 1998–Judge order: granting Mike Harman's intervenor motion for leave to intervene on behalf of Donald James Gralike.

November 16, 1998–Argued and submitted in Kansas City, MO to Judges. Theodore McMillian, Circuit Judge, Floyd R. Gibson, Senior Judge, David R. Hansen, Circuit Judge. Elizabeth W. Lane for Appellant Rebecca McDowell Cook. Kris W. Kobach for Amicus on Behalf of Appellant Professor Kris W. Kobach. Arthur A. Benson for Intervenor on Appeal Mike Harman, Appellee Donald James Gralike. Rebuttal by: Elizabeth W. Lane.

August 31, 1999–The Court: Theodore McMillian, Floyd R. Gibson, David R. Hansen. Opinion filed by Theodore McMillian published, dissent by David R. Hansen, concur by David R. Hansen.

September 21, 1999–Mandate issued.

December 6, 1999–Notice from Supreme Court that appellant filed petition for writ of certiorari on November 29, 1999.

April 17, 2000–U.S. Supreme Court notice regarding petition for writ of certiorari.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4417-CV-C-9

DONALD JAMES GRALIKE,
Plaintiff,
vs.
REBECCA McDOWELL COOK,
Defendant.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. JURISDICTION

1. Plaintiff Donald James Gralike is, and at all times relevant hereto was, a natural person and a resident of St. Louis, Missouri.

2. Defendant Rebecca McDowell Cook is the Secretary of State of the State of Missouri. Cook is, and at all times pertinent to this litigation was, a natural person who is a resident of Missouri and whose government office is located in Jefferson City, Missouri.

3. This is an action brought by plaintiff pursuant to 42 U.S.C. § 1983 to seek declaratory judgment and injunctive relief to redress the current and future deprivation, under color of Missouri state law of rights, privileges and immunities secured to plaintiff by Article I of and the First and Fourteenth Amendments to the Constitution of the United States of America.

4. Jurisdiction is conferred on this Court in regard to all counts of this Complaint by 28 U.S.C. §§ 1331 and 1343(a)(3).

5. At all times relevant to this Complaint, defendant acted under color and pretense of state law, to wit: under color of the Missouri Constitution and of statutes, ordinances, regulations, customs and usage's of the State of Missouri.

6. At all times relevant to this Complaint, defendant engaged in illegal conduct herein mentioned to the injury of plaintiff and deprived plaintiff of his rights, privileges and immunities secured to him by Article I of and the First and Fourteenth Amendments to the Constitution of the United States of America.

7. This action is brought against defendant in her official capacity.

II. VENUE

8. Venue is conferred upon this Court by 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district. Venue is also conferred upon this Court because, on information and belief, defendant resides within this judicial district.

III. FACTUAL ALLEGATIONS PERTINENT TO ALL CLAIMS

9. Plaintiff hereby incorporates the facts set forth in paragraph 1-8 above, as if fully stated herein.

10. At some time prior to November 5, 1996, defendant was presented with petitions supporting an amendment to Article VIII § fifteen (15) through twenty-two (22) of the Missouri Constitution ("Article VIII").

11. Article VIII deals with the determination of whether candidates from Missouri for the United States Congress ("Congress") support a certain proposed amendment to the United States Constitution which would place limits on the number of terms that members of Congress could serve.

12. A true and accurate copy of the text of Article VIII is attached hereto as Exhibit A and is incorporated herein by this reference.

13. On information and belief, after appropriately investigating the signatures on the petitions supporting Article VIII, defendant certified that Article VIII could be placed on the Missouri statewide ballot for the general election that was held on November 5, 1996.

14. At Cook's direction Article VIII was included on the November 5, 1996 general election ballot.

15. On November 5, 1996, more than fifty percent of the citizens of Missouri who cast votes in regard to Article VIII voted for adoption of Article VIII as an Amendment to the Missouri Constitution.

16. After November 5, 1996, defendant has taken action to implement Article VIII as an Amendment to the Constitution of the State of Missouri.

17. One of the provisions of Article VIII instructs Missouri legislators to use all of their delegated powers to pass the federal term limit amendment of § 16.

18. One of the provisions of Article VIII is that candidates who fail to sign a written oath stating, among other things, that they will vote in favor of a certain proposed amendment to the United States Constitution, specifically set forth in Article VIII, to limit the number of terms that can be served by members of Congress, will have a "designation" placed next to the candidate's name on the ballot stating either "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" (the "Term Limit Designation").

19. Defendant, in her official capacity as Secretary of State of the State of Missouri, is required by Article VIII to determine which candidates will have the Term Limit Designation placed by their name.

20. In her official capacity as Secretary of State of the State of Missouri, defendant is otherwise responsible for the implementation of Article VIII.

21. Under the provisions of Article VIII, unless candidates support all of the terms of the term limitation amendment that is contained in Article VIII, they will be designated as a candidate who has "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS".

22. In many instances, under Article VIII, defendant would be required to designate candidates who actually support term limits as

having "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS". For example, if a candidate for Congress supports the general concept of term limits but opposes a provision that would allow other states to adopt longer term limits then, under Article VIII, the candidate would still be designated as having "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS". *See* Article VIII § 16(c).

23. Due to the facts set forth in the immediately preceding paragraph, Article VIII, as enacted, would require the defendant to place designations next to candidates names that were factually inaccurate.

24. Plaintiff is more than twenty-five years of age. He is, and at all times pertinent to this litigation has been, a resident of the State of Missouri and particularly of Missouri's third congressional district. He is, and at all times pertinent to this litigation has been, a taxpayer and registered voter in the State of Missouri.

25. Plaintiff is, and for a period of more than seven years has been, a citizen of the United States of America.

26. Plaintiff is eligible to be a candidate for the position of congressional representative for the United States Congress for the third congressional district of Missouri.

27. In 1976, plaintiff was a candidate for the position of congressional representative for the United States Congress for the third congressional district of Missouri and is currently considering once again seeking election to the United States Congress. Plaintiff may not formally file his candidacy until early 1998 pursuant to Mo. Rev. Stat § 115.349. No federal statutes require plaintiff to register his candidacy at this time; plaintiff meets all presently applicable requirements to be a candidate for Congress.

28. Plaintiff generally is inclined to be against limitations on terms of members of Congress, but, because of the vagueness of Article VIII, he is unable to determine whether he would be willing to take action fully consistent with the provisions of the "Term Limits Pledge" discussed in Section 18 of Article VIII.

29. Plaintiff opposes any provision of state law that would require candidates for elected office to sign any pledge or face having a designation placed by their name for failing to do so.

30. If the Term Limit Designation is placed by plaintiff's name on any ballot it will damage his chances of being elected to Congress. Because of the damage that the Term Limit Designation would do to plaintiff's candidacy and because he cannot reasonably ascertain whether the Term Limit Designation would be applied to him, plaintiff has not moved forward with initial exploration of his election campaign for Congress.

31. The various obligations placed on members of Congress by Sections 17 and 18 of Article VIII are unduly vague and their meaning is not readily ascertainable.

32. Plaintiff believes that the obligations placed on members of Congress by Sections 17 and 18 of Article VIII would unduly limit his ability to exercise his best judgment and to represent his constituents in regard to issues, including, but not limited to, term limitations, if he were elected as a member of Congress. Because of these concerns, if Article VIII remains in place, plaintiff will not run for Congress even if all other factors appear to him to favor his election.

COUNT I

IMPERMISSIBLE ADDITION TO THE QUALIFICATIONS OF CANDIDATES

33. Plaintiff hereby incorporates the facts set forth in paragraph 1-32 above, as if fully stated herein.

34. Article I of the United States Constitution (the "Constitution") establishes the qualifications for candidacy for election to Congress.

35. Article VIII effectively adds to the qualifications imposed under Article I of the Constitution the requirement that all candidates take a position on the issue of term limits or be branded with a negative "designation" for not doing so.

36. Plaintiff has been damaged and will continue to be damaged by Article VIII because the additional qualifications for election to Congress make it less likely that Mr. Gralike will be elected to Congress.

WHEREFORE plaintiff prays that the Court grant declaratory judgment against defendant:

(a) declaring the Article VIII as unconstitutional as violative of Article I of the United States Constitution;

(b) awarding permanent injunctive relief staying defendant from implementing, in any way, Article VIII;

(c) awarding plaintiff his attorneys fees, costs and expenses for bringing this action; and

(d) awarding such other and further relief as may be just and proper.

COUNT II

ARTICLE VIII IS UNCONSTITUTIONALLY VAGUE

37. Plaintiff hereby incorporates the facts set forth in paragraph 1-36 above, as if fully stated herein.

38. Article VIII Section 17 sets out a series of affirmative tasks required for members of Congress from Missouri if they are to avoid the Term Limit Designation.

39. Section 18 of Article VIII establishes a "Term Limits Pledge" to be provided to all candidates for Congress from Missouri (the "Pledge"). That pledges reads as follows:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

40. The Pledge can not be understood by an average person for numerous reasons, including, but not limited to, the following: the

term "term limits" is vague and ambiguous; Article VIII's description of what actions must be taken by a legislator to prevent the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" (the "Demanded Acts") is vague and ambiguous.

41. Among the Demanded Acts is the requirement that representatives in Congress vote for the specific term limits amendment that is proposed in Article VIII, whenever it is brought to a vote. This requirement, however, does not make clear what the representatives are to do if the proposed term limits amendment has itself been amended. For example, if the term limits amendment is amended to include a provision that would delay implementation of the term limits amendment until the year 2010, Article VIII does not make clear whether the representative is required to vote for or against the amendment in that form. Similarly, if subsection (c) of the term limits amendment were deleted, Article VIII is unclear as to whether the representative is required to vote in favor of or against the altered amendment.

42. All of the Demanded Acts of Section 17 are similarly vague and ambiguous.

43. Section 19(2) of Article VIII provides that in determining whether to place the Term Limit Designation by a candidate's name, defendant is "to consider timely submitted public comments."

44. Article VIII does not describe how public comments are to be considered by defendant, nor what weight they are to be given, in determining whether the Term Limit Designation is to be place by a candidate's name. For example, if a candidate has signed the Term Limits Pledge, but defendant receives numerous public comments that the candidate is against term limits, Article VIII does not provide whether the Term Limits Designation is to be placed by the candidate's name.

45. Section 19(5) of Article VIII provides a process for appealing determinations not to place the Term Limits Designation by a given candidate's name, but does not set forth the standard upon which the determination is to be reviewed.

46. Because Article VIII is vague and ambiguous plaintiff cannot determine whether he, in good faith, could take the Term Limits Pledge or, even if he did, whether the Term Limits Designation would be placed by his name on the ballot.

47. Plaintiff has been damaged by the vagueness and ambiguity of Article VIII in that, due to that ambiguity, he has not been and will not be able to determine whether he will run for election to Congress.

WHEREFORE plaintiff prays that the Court grant declaratory judgment against defendant:

(a) declaring the Article VIII unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution;

(b) awarding permanent injunctive relief staying defendant from implementing, in any way, Article VIII;

(c) awarding plaintiff his attorneys fees, costs and expenses for bringing this action; and

(d) awarding such other and further relief as may be just and proper.

COUNT III

ARTICLE VIII VIOLATES MR. GRALIKE'S RIGHT OF FREE SPEECH

48. Plaintiff hereby incorporates the facts set forth in paragraph 1-47 above, as if fully stated herein.

49. Article VIII effectively forces candidates for Congress in Missouri to take a position on terms limits and, as such constitutes forced speech.

50. Article VIII will have a chilling effect on free speech by requiring candidates for Congress from Missouri either to adopt the "Term Limits Pledge" or face the consequences of having a negative "designation" placed by their name on the ballot.

51. There is no compelling State interest to support the forced speech required by Article VIII or to support the chilling effect that Article VIII would have on political speech.

52. Plaintiff has been damaged by Article VIII because its restrictions on political speech and its forced political speech have forced him to delay preparations for a campaign for Congress. If Article VIII is allowed to remain in effect, plaintiff will continue to be damaged because Article VIII will have a chilling effect on his political speech and will effectively force him to speak on the term limits issue.

WHEREFORE plaintiff prays that the Court grant judgment against defendant:

(a) declaring the Article VIII unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution;

(b) awarding permanent injunctive relief staying defendant from implementing, in any way, Article VIII;

(c) awarding plaintiff his attorneys fees, costs and expenses for bringing this action; and

(d) awarding such other and further relief as may be just and proper.

COUNT IV

THE JURISDICTIONAL LIMITS OF ARTICLE VIII VIOLATE THE SUPREMACY CLAUSE

53. Plaintiff hereby incorporates the facts set forth in paragraph 1-52 above, as if fully stated herein.

54. Under the Federal Rules of Civil Procedure and 42 U.S.C. § 1983, the United States District Court for the Western District of Missouri has jurisdiction to decide this matter.

55. Section 21 of Article VIII states: "Any legal challenge to this Amendment shall be filed as an original action before the Supreme Court of this State." (the "Jurisdictional Limitation").

56. The Jurisdictional Limitation purports to deprive this Court of jurisdiction to hear this case. Accordingly, the Jurisdictional Limitation is in violation of the Supremacy Clause of Article VI of the United States Constitution.

57. Plaintiff would be damaged if he were required to bring this matter as an original action in the Supreme Court of Missouri because it would deprive him of his right under federal law to bring this case in federal court.

COUNT V

ARTICLE VIII VIOLATES ARTICLE V OF THE UNITED STATES CONSTITUTION

58. Plaintiff hereby incorporates the facts set forth in paragraph 1-57 above, as if fully stated herein.

59. Article VIII acts as a binding command to the Missouri legislature through its language that the members of Congress are "instruct[ed]. . .to use all of [their] delegated powers to pass the Congressional Term Limits Amendment set forth above." Mo. Const. Art. VIII § 17.

60. Article VIII effectively forecloses legislators' independent deliberations and decisions by vesting power to enact legislation in the hands of the people of the state of Missouri through ordering the legislators to vote in a certain manner.

61. This instruction unconstitutionally expands the authority of the people of Missouri to participate in the amendment process to the federal constitution.

62. By Article V, federal amendment functions are specifically delegated to the state and federal legislatures, not the people of the states. The deliberative process prescribed by Article V may not be so abridged through fixed state constitutional "instructions" to pass an amendment as proposed by Article VIII. If this were allowed, the people would indirectly be doing what they may not directly do under the law—amend the United States Constitution.

WHEREFORE plaintiff prays that the Court will grant judgment against defendant:

(a) declaring Article VIII unconstitutional as violative of Article V of the United States Constitution;

(b) awarding permanent injunctive relief staying defendant from implementing, in any way, Article VIII;

(c) awarding plaintiff his attorneys fees, costs and expenses for bringing this action; and

(d) awarding such other further relief as may be just and proper.

COUNT VI

ARTICLE VIII IS BEYOND THE POWER OF INITIATIVE GRANTED TO THE PEOPLE BY THE MISSOURI CONSTITUTION, ARTICLE III §§ 49-50.

63. Plaintiff hereby incorporates the facts set forth in paragraph 1-62 above, as if fully stated herein.

64. Article XII of the Missouri Constitution provides that voters may amend the Missouri constitution without the General Assembly by passing initiative-proposed amendments.

65. While Article VIII has the form and label of a constitutional amendment, the subject matter reveals its true nature as being a directive to the legislature to take a specific action, which is not a power reserved for the people by initiative.

WHEREFORE plaintiff prays that the Court will grant judgment against defendant:

(a) declaring Article VIII unconstitutional as beyond the power of the people by Articles III and XII of the Missouri Constitution;

(b) awarding permanent injunctive relief staying defendant from implementing, in any way, Article VIII;

(c) awarding plaintiff his attorneys fees, costs and expenses for bringing this action; and

(d) awarding such other further relief as may be just and proper.

Respectfully submitted,

BENSON & ASSOCIATES

By: /s/ [Jane McQueeny]
Arthur Benson, #21107
Gregg Lombardi, #36139
Jane McQueeny, #34425
Kathy Finnell, #42332

ATTORNEYS FOR PLAINTIFF

Date: July 15, 1997

[Address and Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[Caption Omitted]

FIRST AMENDED ANSWER

Defendant Rebecca McDowell Cook, through counsel, answers plaintiff's First Amended Complaint as follows:

JURISDICTION

1. Based on the information and belief of defendant, defendant admits the allegations contained in ¶ 1 of plaintiff's First Amended Complaint.

2. Defendant admits that she is the Missouri Secretary of State. Defendant also admits that she is a natural person whose government office is in Jefferson City, Missouri.

3. Plaintiff's allegation in ¶ 3 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant is without sufficient information to admit or deny the allegations contained in ¶ 3 and, therefore, denies the same.

4. Defendant admits that jurisdiction would be proper under 28 U.S.C. § § 1331, and 1343(a)(3), but denies that plaintiff has pled a cause of action sufficient to invoke this Court's jurisdiction.

5. Defendant admits the allegations contained in ¶ 5 of plaintiff's First Amended Complaint and asserts that she shall continue to act under color and pretense of state law in support of her duties as Secretary of State.

6. Defendant denies the allegations contained in ¶ 6 of plaintiff's First Amended Complaint.

7. Defendant denies the allegations contained in ¶ 7 of plaintiff's First Amended Complaint. Defendant is entitled to

qualified immunity for any claim for monetary damages against her in her official capacity.

VENUE

8. Defendant admits venue would be proper if plaintiff stated a claim, but denies plaintiff has stated a claim sufficient to invoke venue in the Court's jurisdiction.

FACTUAL ALLEGATIONS PERTINENT TO ALL CLAIMS

9. Defendant reasserts her responses to ¶'s 1-8 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

10. Defendant admits the allegations contained in ¶ 10 of plaintiff's First Amended Complaint.

11. Plaintiff's allegation in ¶ 11 is a summary of the provisions of Article VIII and does not require defendant to respond; however, to the extent defendant should respond, defendant asserts Article VIII speaks for itself.

12. Defendant denies the allegations in ¶ 12 of plaintiff's First Amended Complaint as no Exhibit A was attached to plaintiff's First Amended Complaint. Assuming, arguendo, that Exhibit A is intended to be the same as Exhibit A in plaintiff's original Complaint, defendant denies any allegations as Exhibit A does not fully represent Article VIII.

13. Defendant denies the allegations contained in ¶ 13 of plaintiff's First Amended Complaint. Defendant certified the issue for the ballot pursuant to a court order after initially determining that the provision lacked sufficient signatures.

14. Defendant admits that a portion of Article VIII was included on the November 5, 1996, general election ballot pursuant to a court order, and denies the remaining allegations of ¶ 14 of plaintiff's First Amended Complaint.

15. Defendant admits the voters adopted sections 15-22 of Article VIII as an amendment to the Missouri Constitution, not

Article VIII in its entirety as suggested in plaintiff's First Amended Complaint.

16. Defendant admits the allegations contained in ¶ 16 of plaintiff's First Amended Complaint.

17. Plaintiff's allegation in ¶ 17 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant denies the allegations contained in ¶ 17 of plaintiff's First Amended Complaint and asserts that Article VIII speaks for itself.

18. Plaintiff's allegation in ¶ 18 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant denies the allegations contained in ¶ 18 of plaintiff's First Amended Complaint and asserts that Article VIII speaks for itself.

19. Plaintiff's allegation in ¶ 19 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant denies the allegations contained in ¶ 19 of plaintiff's First Amended Complaint and asserts that Article VIII speaks for itself.

20. Plaintiff's allegation in ¶ 20 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant denies the allegations contained in ¶ 20 of plaintiff's First Amended Complaint and asserts that Article VIII speaks for itself.

21. Plaintiff's allegation in ¶ 21 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant denies the allegations contained in ¶ 21 of plaintiff's First Amended Complaint and asserts that Article VIII speaks for itself.

22. Defendant admits Article VIII puts the Secretary of State in the position of designating candidates in some instances as having "DECLINED TO PLEDGE SUPPORT OF TERM LIMITS," but is without sufficient information to admit or deny the remaining allegations in ¶ 22 of plaintiff's First Amended Complaint and, therefore, denies the same.

23. Defendant is without sufficient information to admit or deny the allegations in ¶ 23; therefore, defendant denies the same.

24. Based on information and belief, defendant admits the allegations contained in ¶ 24.

25. Based on information and belief, defendant admits the allegations contained in ¶ 25.

26. Based on information and belief, defendant admits the allegations contained in ¶ 26.

27. Defendant admits plaintiff was a candidate for Congress in 1976; Defendant asserts that Section 115.349, RSMo, speaks for itself; Defendant lacks sufficient information to admit or deny the remaining allegations contained in ¶ 27 and, therefore, denies the same.

28. Defendant admits that plaintiff is generally inclined to be against term limits, but is without sufficient information to admit or deny the remaining allegations contained in ¶ 28 and, therefore, denies the same.

29. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 29 and, therefore, denies the same.

30. Defendant denies the term limit designation will damage plaintiff's candidacy, but is without sufficient information to admit or deny the remaining allegations contained in ¶ 30 and, therefore, denies the same.

31. Defendant denies sections 17 and 18 of Article VIII are unconstitutionally vague and is without sufficient information to admit or deny the remaining allegations in ¶ 31 and, therefore, denies the same.

32. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 32 and, therefore, denies the same.

COUNT I

33. Defendant reasserts her responses to ¶'s 1-32 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

34. Defendant admits the allegations contained in ¶ 34 of plaintiff's First Amended Complaint.

35. Defendant denies the allegations contained in ¶ 35 of plaintiff's First Amended Complaint.

36. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 36 and, therefore, denies the same.

WHEREFORE, Defendant Rebecca McDowell Cook, prays that Count I of plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said defendant, that costs be assessed against plaintiff, and for such other and further relief as this Court deems just and proper.

COUNT II

37. Defendant reasserts her responses to ¶'s 1-36 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

38. Defendant admits Section 17 establishes "Voter Instruction on Term Limits for Members of Congress," but is without sufficient information to respond to the remaining allegations contained in ¶ 38 of plaintiff's First Amended Complaint and, therefore, denies the same.

39. Plaintiff's allegation in ¶ 39 is a legal statement and does not require defendant to respond; however, to the extent defendant should respond, defendant asserts Section 18 of Article VIII speaks for itself.

40. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 40 and, therefore, denies the same.

41. Defendant admits Article VIII sets forth "Voter Instructions on Term Limits for Members of Congress," but is without sufficient information to respond to the remaining allegations contained in ¶ 41

of plaintiff's First Amended Complaint and, therefore, denies the same.

42. Defendant denies the allegations contained in ¶ 42 of plaintiff's First Amended Complaint.

43. Defendant admits the allegations contained in ¶ 43 of plaintiff's First Amended Complaint.

44. Plaintiff's allegation in ¶ 44 does not state an allegation of fact and does not require defendant to respond; however, to the extent defendant should respond, defendant is without sufficient information to admit or deny the allegations contained in ¶ 44 and, therefore, denies the same.

45. Defendant denies the allegations contained in ¶ 45 of plaintiff's First Amended Complaint.

46. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 46 and, therefore, denies the same.

47. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 47 and, therefore, denies the same.

WHEREFORE, Defendant Rebecca McDowell Cook, prays that Count II of plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said defendant, that costs be assessed against plaintiff, and for such other and further relief as this Court deems just and proper.

COUNT III

48. Defendant reasserts her responses to ¶'s 1-47 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

49. Defendant denies the allegations contained in ¶ 48 of plaintiff's First Amended Complaint.

50. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 50 and, therefore, denies the same.

51. Defendant denies the allegations contained in ¶ 51 of plaintiff's First Amended Complaint.

52. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 52 and, therefore, denies the same.

WHEREFORE, Defendant Rebecca McDowell Cook, prays that Count III of plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said defendant, that costs be assessed against plaintiff, and for such other and further relief as this Court deems just and proper.

COUNT IV

53. Defendant reasserts her responses to ¶'s 1-52 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

54. Defendant admits that jurisdiction would be proper, but denies that plaintiff has pled a cause of action sufficient to invoke this Court's jurisdiction.

55. Plaintiff's allegation in ¶ 55 quotes Section 21 of Article VIII, and does not require defendant to respond; however, defendant admits that to the extent plaintiff quotes Article VIII, Section 21, he has done so accurately.

56. Defendant denies the allegations contained in ¶ 56 of plaintiff's First Amended Complaint.

57. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 57 and, therefore, denies the same.

WHEREFORE, Defendant Rebecca McDowell Cook, prays that Count IV of plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said defendant, that costs be assessed against plaintiff, and for such other and further relief as this Court deems just and proper.

COUNT V

58. Defendant reasserts her responses to ¶'s 1-57 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

59. Defendant denies the allegations contained in ¶ 59 of plaintiff's First Amended Complaint.

60. Defendant denies the allegations contained in ¶ 60 of plaintiff's First Amended Complaint.

61. Defendant denies the allegations contained in ¶ 61 of plaintiff's First Amended Complaint.

62. Defendant is without sufficient information to admit or deny the allegations contained in ¶ 62 and, therefore, denies the same.

WHEREFORE, Defendant Rebecca McDowell Cook, prays that Count V of plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said defendant, that costs be assessed against plaintiff, and for such other and further relief as this Court deems just and proper.

COUNT VI

63. Defendant reasserts her responses to ¶'s 1-62 of plaintiff's First Amended Complaint and incorporates them by reference as if fully set forth herein.

64. Defendant admits Article XII of the Missouri Constitution provides for amendment to the Missouri Constitution pursuant to Article XII, Section 2(b) and Article III, Sections 49-50 as alleged in ¶ 64 of plaintiff's First Amended Complaint.

65. Defendant denies the allegations contained in ¶ 65 of plaintiff's First Amended Complaint.

66. Defendant denies any and all allegations contained in Plaintiff's First Amended Complaint which are not expressly admitted herein.

WHEREFORE, Defendant Rebecca McDowell Cook, prays that Count VI of plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said defendant, that costs be assessed against plaintiff, and for such other and further relief as this Court deems just and proper.

AFFIRMATIVE DEFENSES

In further support of its Answer, the Defendant affirmatively states:

67. Plaintiff has failed to state a claim upon which relief can be granted as required by Federal Rule of Civil Procedure 12(b)(6).

68. Pursuant to Article III, Section 2 of the Constitution of the United States, plaintiff's allegations are not ripe.

69. Pursuant to Article III, Section 2 of the Constitution of the United States, the plaintiff lacks standing to bring this lawsuit.

70. Pursuant to Article I, Section 4, Clause 1 of the Constitution of the United States, individual states regulate the time, place and manner of Congressional elections.

71. Pursuant to the Tenth Amendment of the Constitution of the United States, individual states reserve the right to regulate the language printed on ballots.

72. Defendant is entitled to Eleventh Amendment immunity on the Plaintiffs' claims. Therefore this court lacks subject-matter jurisdiction.

73. Defendant is protected from liability by the doctrine of qualified immunity.

74. Plaintiff's attempt to secure a determination that Article VIII, Sections 15 - 22 of the Missouri Constitution violates the Constitution of the United States before the Supreme Court of Missouri has had an opportunity to construe its constitution and perhaps avoid a federal constitutional issue is an affront to Missouri's retained sovereignty unauthorized by any provision of the federal constitution, and, as such, this court lacks jurisdiction over the subject matter of this action.

75. In further defense, Defendant specifically incorporates by reference each and every other additional affirmative defenses that may be uncovered or made known during the investigation and discovery in this case. Defendant specifically reserves the right to amend her answer to include affirmative defenses at the time they are discovered.

WHEREFORE, defendant, Rebecca McDowell Cook, respectfully requests plaintiff's First Amended Complaint be dismissed with prejudice, that judgment be entered in favor of said

defendant, that costs be assessed against plaintiff, and for such other relief as this Court deems just and proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Deputy Attorney General For Litigation
/s/ [Tina M. Crow Halcomb]
TINA M. CROW HALCOMB
Missouri Bar No. 47128
Assistant Attorney General
/s/ [Mike Zito]
MIKE ZITO
Missouri Bar No. 47248
Assistant Attorney General

[Address and Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[Caption Omitted]

DECLARATION OF DONALD GRALIKE

I, Donald James Gralike, declare under penalty of perjury that the following is true and correct:

1. My name is Donald J. Gralike and I am the plaintiff in the case captioned *Donald James Gralike v. Rebecca McDowell Cook;* Case No. 96-4417-CV-C-9.

2. It is my present intention to run for the United States Congress in the Third District of Missouri in the year 1998.

3. Further, it is my present intention to comply with all Missouri Statutes for declaring my candidacy for the U.S. Congress during the time periods set forth in the statutes.

4. It is my understanding that §115.349 RSMo., 1994, sets out the time for filing a declaration of candidacy:

> A. Except as otherwise provided in sections 115.361 to 115.383, no candidate's name shall be printed on any official primary ballot unless the candidate has filed a written declaration of candidacy in the office of the appropriate election official by 5:00 p.m. on the *last Tuesday in March immediately preceding the primary election.*
>
> B. No declaration of candidacy for nomination in a primary election shall be accepted for filing prior to *8:00 a.m. on the last Tuesday in February immediately preceding the primary election.* (emphasis added)

5. It is my understanding that the earliest time I can officially file for purposes of placing my name on the ballot as a candidate for

U.S. Congress is the last Tuesday in February, which will be February 24, 1998.

6. I intend to file my declaration of candidacy for U.S. Congress in accordance with §115.353 and §115.355 RSMo., 1994. In addition, I will pay the $100 filing fee as required by §115.357 RSMo., 1994, during the period of time provided for such payments.

7. It is my understanding that there are no other formal or official steps I may take to declare my candidacy until I file my declaration of candidacy in person with that office during the period of time provided by lay in §115.353 and §115.355 RSMo., 1994. If other steps or actions required by law are brought to my attention, I will immediately comply with all such requirements.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ [Donald James Gralike
Donald James Gralike

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[Caption Omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW plaintiff Donald James Gralike ("Gralike") and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves for summary judgment in this matter.

In support of this motion, Gralike states that there is no dispute as to any material fact in this matter. Under the undisputed facts of this case, Gralike is entitled to judgment as a matter of law because Sections 15-22 of Article VIII of the Missouri Constitution (the "Amendment") are unconstitutional because: (1) the Amendment violates the Qualifications Clause contained in Article I of the Constitution by handicapping a group of potential candidates for federal office; (2) the Amendment is unconstitutionally vague; (3) the Amendment improperly infringes on candidates' First amendment rights of free speech; (4) the Amendment violates Article V of the Constitution by attempting to influence the federal constitutional amendment process; and, (5) the Amendment's jurisdictional provisions violate the Supremacy Clause of the Constitution.

Gralike has filed Suggestions in support of this Motion, which are incorporated herein by this reference. Gralike also files the following documents in support of his Motion: pertinent portions of the transcript of the deposition of defendant Rebecca Cook (attached hereto as Exhibit 1); the Initiative Petition for the Amendment (Exhibit 2); ballot language for the Amendment (Exhibit 3); and pertinent portions of the transcript of the deposition of Deborah Cheshire (pp. 19-21) (Exhibit 4).

For the foregoing reasons, plaintiff Gralike respectfully submits that the Court should enter judgment in his favor in his matter.

Respectfully submitted.

ARTHUR A. BENSON &
ASSOCIATES

/s/ [Gregg Lombardi]

ARTHUR BENSON	#21107
JANE McQUEENY	#34425
GREGG LOMBARDI	#36139

ATTORNEYS FOR PLAINTIFF

[Address and Certificate of Service Omitted]

STATE OF MISSOURI
COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

September 22, 1996

The Honorable Rebecca M. Cook
Secretary of State
State of Missouri
Jefferson City, MO 65101

Dear Ms. Cook:

The Committee on Legislative Research has adopted a fiscal note summary for an amendment to the Constitution of Missouri as proposed by initiative petition known as Constitutional Amendment Number 9 that has been deemed sufficient for ballot status by Circuit Judge Thomas J. Brown and it reads as follows:

The taxpayers of Missouri will have costs of over $40,000 per year to track records of candidates and county election authorities will have increased costs for printing ballots. Does not include costs of possible litigation.

A copy of the fiscal note for the proposed amendment is enclosed. If you have any questions regarding this matter, please feel free to contact me.

For the Committee,
/s/ [Jeanne Jarrett]
Jeanne Jarrett, CPA
Director, Oversight Division

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R.NO. 5003-01
BILL NO. Constitutional Amendment 9
SUBJECT: Constitutional Amendments: Term Limits
TYPE: #Corrected
DATE: September 22, 1996

#To change references to General Assembly to references to Congress

FISCAL SUMMARY

ESTIMATED NET EFFECT ON STATE FUNDS			
FUND AFFECTED	FY 1997	FY 1998	FY 1999
General Revenue	($67,600)	($29,092)	($41,273)
Total Estimated Net Effect on All State Funds	($67,600)	($29,092)	($41,273)

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 1997	FY 1998	FY 1999
NONE			
Total Estimated Net Effect on All Federal Funds	$0	$0	$0

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 1997	FY 1998	FY 1999
Local Government	(Unknown)	(Unknown)	(Unknown)

Numbers within parentheses: ( ) indicate costs or losses
This fiscal note contains 3 pages.

FISCAL ANALYSIS

ASSUMPTION

Officials of the **Secretary of State (SOS)** would request 1.25 FTE. One Paralegal and an attorney for one-quarter time. The Paralegal would monitor, catalogue and store the #Congressional Record; attend sessions and committee hearings of the Congress; record, review, store and check the validity of public comments; record and store prospective candidates' pledges; advise the Elections Division and counsel of findings with regard to actions and recorded statements of Congressional candidates; and testify during subsequent litigation. The attorney would be directly responsible for handling anticipated litigation. **Oversight** assumes legal help would be acquired on an as needed basis and has classified these costs as expenses.

Advertisement costs for the proposal would be $1,300 per column inch for the text of the proposal, the introduction, title, fiscal note summary, and affidavit. The proposal would be on the ballot for the November 1996 general election.

The Boone and Buchanan County Clerks noted that the effect of the proposal on election costs would depend upon how many affected candidates are on a ballot. Additional costs to election authorities could range from zero to well over $100,000 for a given election in a given county.

FISCAL IMPACT - State Government	FY 1997	FY 1998 (7 MO)	FY 1999
GENERAL REVENUE FUND			
Cost to Secretary of State			
Personal Service (1 FTE)	$0	$11,594	$21,012
Fringe Benefits	0	3,675	6,459
Expense and Equipment	0	5,730	0
Travel to Washington D.C.	0	1,866	3,296
Subscription to Congressional Record	0	250	0
Attorneys	0	5,977	10,506
Newspaper Advertisements	67,600	0	0
Administrative Costs for Secretary of State	(67,600)	($29,092)	($41,273)
ESTIMATED NET EFFECT ON GENERAL REVENUE FUND	**(67,600)**	**($29,092)**	**($41,273)**

FISCAL IMPACT - Local Government	FY 1997	FY 1998	FY 1999

Cost to County Clerks

The additional matter required to be printed on each ballot could cause a small increase in cost for printing ballots.

FISCAL IMPACT- Small Business

No direct fiscal impact would be expected on small businesses as a result of this proposal.

DESCRIPTION

This proposal would require summaries of the positions, records or intentions of candidates for the United States Congress on the issue of term limits adjacent to candidates' names on election ballots.

This legislation is not federally mandated, would not duplicate any other program, and would not immediately require additional capital improvements or rental space.

SOURCES OF INFORMATION

Secretary of State
Boone County Clerk
Buchanan County Clerk

Jeanne Jarrett, CPA
Director
September 22, 1996

OFFICE OF THE SECRETARY OF STATE

MEMORANDUM

TO: The Honorable Gary Burton
Representative, District 128

The Honorable Ralph Monaco
Representative, District 49

FROM: June Striegel Doughty
General Counsel

DATE: March 14, 1997

RE: Term Limits Legislation

We very much appreciate your willingness to sponsor legislation that will assist our office in implementing the provisions of Article VIII of the Missouri Constitution which Missouri voters adopted last November. As you know the Missouri Constitution now requires the Secretary of State to accurately determine: (1) whether non-incumbent Missouri candidates for congressional office have taken or declined to take the Congressional Term Limits Amendment Pledge that is set forth in the Missouri Constitution; and (2) whether incumbent candidates for congressional office have fulfilled the voter instruction set forth in the Missouri Constitution or should have "the Scarlet Letter" placed adjacent to their name on the primary and general election ballots.

This memorandum is intended to provide you with a written explanation of why we believe the proposed legislation is necessary and to provide you with copies of other information that may be relevant to you or others at the upcoming hearing.

I have also made contact with the offices of each of our congressional delegates and have forwarded to them a copy of the statutory provision we have proposed to you and the General Assembly for adoption in Missouri. Although Senator Bond's office indicated they would be making a written response, nothing has been received in this office from any of our congressional delegates.

While the Constitutional provisions are quite specific in many respects, there are a number of unanswered questions that will need to be addressed at some point between now and election day in some forum, possibly the courts.

The HCS HB 681 addresses and clarifies four basic matters which, if left unaddressed could lead to unnecessary confusion and litigation and could further delay finality of the ballots and increase costs to the taxpayers of this state.

The four objectives of the bill are:

1. To set a precise deadline when non-incumbent candidates for U.S. Senator and Representative must make their decision regarding whether or not to take the pledge and to provide that if they do not make an affirmative decision on this question they will be deemed to have declined. The deadline proposed is the close of candidate filing or, if a candidate is filing for office for some reason after the close of candidate filing at the time they file their declaration of candidacy.

2. To establish when the SOS will make determinations regarding whether incumbent candidates will receive the Scarlet Letter. The Constitution requires the SOS to make determinations regarding non-incumbent candidates not later than 5 business days after the deadline for filing for the office. The proposed bill makes the deadline for incumbents the same, that is 5 business days after the deadline for filing for the office.

3. The Constitution requires the SOS to consider "timely" submitted public comments and information submitted by the candidates. The proposed legislation requires the comments and information to be in writing and defines "timely" as comments and information received by the SOS prior to the deadline for filing for the office.

4. The final objective of the proposed legislation is to allow the SOS to take a common sense approach in making her determinations and to not certify the Scarlet Letter next to the names of incumbent candidates who have complied in all material respects with the voter instruction contained in the Constitution.

There are many possible issues still to be addressed. The U.S. Supreme Court recently let stand an Arkansas Supreme Court ruling which invalidated a similar law in that state. In addition, the Oklahoma Supreme Court has also invalidated a similar initiative. Copies of these cases are attached for your review. Also attached is a copy of the case that has been filed in federal court in Missouri challenging the constitutional term limits provisions in federal court. Finally, recent news articles dealing with this issue are also attached for your review, including one article from Rapid City, South Dakota describing a unique approach to the issue in that state.

We are hopeful that the General Assembly will assist us through legislation in keeping the confusion and costs associated with our Constitutional duties at a minimum. Thank you for your support in this effort.

Attachments

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[Caption Omitted]

---

[4]

DIRECT EXAMINATION

BY: MS. McQUEENY:

Q. Would you please state your name for the record.

A. Debbie Cheshire.

Q. And, Ms. Cheshire, I introduced myself to you off the record. My name is Jane McQueeny. I'm here today on behalf of the plaintiff, whose name is Donald Gralike, and he has sued the Secretary of State over Article VIII. Do you understand that, ma'am? Do you understand all of that? That I'm here on behalf of the --

A. Right.

Q. --plaintiff and that Mr. Gralike has sued the Secretary of State over Article VIII.

A. That's correct.

Q. I'm here today to ask you some questions about your role in the Secretary of State's office and any factual knowledge you have that we may think [5] is helpful to the lawsuit. Do you understand that?

A. I understand.

Q. Have you ever had your deposition taken before?

A. No. Never.

Q. Just a couple of real quick ground rules. One of the reasons lawyers take depositions so that if we go to trial on this matter, which is currently scheduled for March, and you testify differently than you

do today, then we can use your testimony from today to impeach you.

Additionally, it's our way of talking to you and gathering knowledge of your factual knowledge about the case. Do you understand that?

A. Yes.

Q. And you understand you're under oath?

A. Yes.

Q. And I'm going to ask you questions and I would really appreciate it, Miss Cheshire, if you don't understand one of my questions, you let me know. Okay?

A. Okay.

Q. And I'm going to assume if you do answer my questions, that you have understood them. Is [6] that a fair assumption on my part?

A. Yes.

Q. And you have to give audible responses.

A. Okay.

Q. Additionally, Ms. Halcomb is here as your attorney and if you need to take a break, just please let her know or let me know and we'll be happy to do that. I don't anticipate we'll be here too much longer.

A. Yes.

Q. Please tell me if you will, ma'am, what position you have with the Secretary of State's office.

A. I'm director of Elections.

Q. And how long have you been director of Elections?

A. Since August of '95.

Q. What did you do prior to becoming director of Elections in August of 1995?

A. I worked for the Missouri Senate.

Q. What did you do for the Missouri Senate?

A. I was in the enrolling room which was --

Q. I'll tell you, I have no idea what the enrolling room is.

A. Well, it was proofing Senate bills, making the amendments that were approved on the floor and [7] then proofing and getting ready for print.

Q. And who was your actual employer? The State of Missouri?

A. Yes.

Q. Were you involved in drafting any legislation?

A. No.

Q. And how long did you work in the enrolling room?

A. Two years.

Q. And prior --

A. Well, let me think. Yes, two years.

Q. Prior to that what did you do?

A. I worked for the City of Jefferson City.

Q. And what did you do?

A. I was city clerk.

Q. And how long were you city clerk?

A. I think it was around two years.

Q. Do you have a college degree?

A. Yes.

Q. And where did you go to college?

A. William Woods.

Q. What's your degree in?

A. Business management.

Q. As Elections director for the Secretary of State, what have your responsibilities, if any, been as it relates to Article VIII?

[8]

A. When the petition was filed with our office I took control of the actual petition as far as keeping control of the file, the paperwork.

Q. Which looked like was quite a bit.

A. Which was considerable. Oversaw the copying of them and sending them out to the county clerks. And then made sure the responses from county clerks came back as far as certification, as far as the number of signatures that were valid and invalid.

Q. Have you had any other responsibilities as it relates to Article VIII?

A. No. From the time that it was put on the ballot, I mean, I had some responsibility as far as sending out to county clerks what was to be placed on the ballot and then after that, nothing.

Q. What about today? Are you doing anything as it relates to Article VIII as the director of Elections --

A. No.

Q. -- Elections director? Let me -- is that different than the director of Elections? Is that a different title than being Elections director or is that the same title, same person?

* * *

[17]

MS. McQUEENY: And that goes to the file or the documents that were identified as Debbie Cheshire's file.

MS. CROW HALCOMB: Probably should have been more appropriately labeled an Election Division file instead of her personal file and I apologize. I did that for my simplicity, described it as her file. It may not have been her personal file. It was very likely an Election Division file.

MS. McQUEENY: There may be other documents --

MS. CROW HALCOMB: That they may have.

MS. McQUEENY: -- is that right, of that file that we may want to use in the --

MS. CROW HALCOMB: Right. She may have never seen them and they may have been used for other purposes, obviously.

MS. McQUEENY: That was pretty clear today.

MR. LOMBARDI: Exhibit No. 14, we are stipulating that this was the press release that was sent out giving candidates information as to how to file for elected office?

MS. STRIEGEL DOUGHTY: Not exactly. **[18]** That's not what the way I would characterize it.

MR. LOMBARDI: Then you characterize it.

MS. STRIEGEL DOUGHTY: What you have is what I would characterize as an information packet. It includes in there a press release. It also includes information that is distributed to anybody who was inquiring ahead of time and may have even been sent over to all of the incumbent members of the State Legislature on the House side because all of them had to file and we knew most of them were going to. We wanted anybody we could get, frankly, to read that to know we did everything we could to get it out. It includes a press release. It includes, you know, basic information and that is the type of thing we would normally do before candidate filing begins.

MR. LOMBARDI: When Ms. Cook was testifying this morning about guidelines or other information to be -- that was provided to candidates, this Exhibit No. 14 is what she was talking about?

MS. STRIEGEL DOUGHTY: That would be the type of information that she would expect **[19]** her staff to develop. That's correct.

MS. CROW HALCOMB: For the record, I want to say that that satisfied your request for release of information provided two years ago that you asked me to provide.

MR. LOMBARDI: That's exactly right.

MS. CROW HALCOMB: We have also provided you with information -- or clarified that you do have copies of the information sent to the Congressmen in 1997 --

MR. LOMBARDI: Right.

MS. CROW HALCOMB: -- the February 24th memo from June Doughty. You have also requested sample petition pages, which we have next to stipulate to.

MR. LOMBARDI: Right. And that is Exhibit No. 15 and we're stipulating that Exhibit No. 15 is a true and accurate copy of the initiative petition signed by Missouri residents or people who purport to be Missouri residents.

MS. CROW HALCOMB: A sample signature page. That is correct.

MR. LOMBARDI: In regard to Article **[20]** VIII.

MS. CROW HALCOMB: Right. The only thing that you have requested that I have not provided you today is a certified copy of the ballot language. Is that your understanding as well?

MR. LOMBARDI: We were going to make sure that the fax from Roy Blunt was the actual one that was received and that there was --there were no pages missing.

MS. STRIEGEL DOUGHTY: It was just backwards. You can look at it 1 through 7, it's just that it wasn't in the same order that I recalled it. But it's just been reordered in really probably a more logical sense I suppose. All the pages are there.

MR. LOMBARDI: Exhibit No. 6 we're stipulating is the fax received by Ms. Cook's office --

MS. STRIEGEL DOUGHTY: Correct.

MR. LOMBARDI: -- from Roy Blunt's office --

MS. STRIEGEL DOUGHTY: Correct.

MR. LOMBARDI: -- kept in the regular course of business?

[21]

MS. STRIEGEL DOUGHTY: Correct.

MS. CROW HALCOMB: The only outstanding thing you are waiting to receive is my certified copy of the ballot language.

MR. LOMBARDI: Right.

MS. CROW HALCOMB: Certified copy of the ballot language.

MS. McQUEENY: Which I thought we had but obviously --

MS. STRIEGEL DOUGHTY: There was a fiscal note being stuck at the end. I believe what you showed me includes what the ballot language was but that was not certification of the ballot language and we would --

MR. LOMBARDI: We want to be right.

MS. McQUEENY: We'd like that.

MS. CROW HALCOMB: We'll get you that.

MS. STRIEGEL DOUGHTY: We may have it here somewhere. I may have it. Let's see what I can do to recreate this.

(Whereupon, there was a discussion held off the record.)

(WHEREUPON, EXHIBIT NO. 16 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

[22]

MR. LOMBARDI: We are stipulating that Exhibit No. 16 contains the entire ballot language in regard to the amendment to Article VIII that this case is about.

MS. CROW HALCOMB: As well as every other --

MR. LOMBARDI: And the Article VIII language is listed under Constitutional Amendment No. 9, correct?

MS. CROW HALCOMB: That's correct.

MR. LOMBARDI: That's all we need.

MS. CROW HALCOMB: That's everything that you have asked for to date.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[Caption Omitted]

---

[4]

DIRECT EXAMINATION

BY: MR. LOMBARDI:

Q. If you would please state your name for the record.

A. Rebecca McDowell Cook, also known as Becky.

Q. Have you ever had your deposition taken before?

A. Yes.

Q. So you know how the process works?

A. Certainly.

Q. I ask you questions and you answer the questions?

A. Yes.

Q. You understand that the testimony you give here today is just as if you're testifying in a court of law?

A. I certainly do.

Q. Accordingly, it's very important that if I ask a question that you don't understand or if you feel it's vague and ambiguous in any way, that you ask me to clarify the question.

A. I will do that.

[5]

Q. You're a lawyer, is that correct --

A. Correct.

Q. -- before becoming Secretary of State of the State of Missouri? And you are Secretary of State --

A. That's correct.

Q. -- of the State of Missouri? What type of law did you practice?

A. I went through a series of different things I did but a general small town practice.

Q. Were you involved in the writing of contracts?

A. Every once in a while. I did all kinds of things.

Q. And, so, you were involved with the interpretation of contracts and drafting of those contracts from time to time?

A. Surely.

Q. Before becoming Secretary of State did you do any legal work involving statutory interpretation?

A. Not very much. Every once in a while -- once in a great while something like that would come up but generally I didn't get into that area.

Q. Before becoming Secretary of State did you ever participate in proposing or drafting legislation **[6]** or regulations?

A. I was on a committee to develop the joint custody statute for Missouri but I didn't participate in any of the drafting. I was more behind the scenes on how would this process work well.

Q. Did you give any comment on that legislation? Did you do any editing of it?

A. Oh, no.

Q. Since you've been Secretary of State have you participated in the drafting of legislation or regulations?

A. No, in all honesty, I haven't.

Q. Fair enough. Fair enough. Have you ever reviewed draft legislation or regulations that's been done by members of your staff?

A. I certainly have.

Q. And edit it from time to time?

A. I make my comments but I don't edit anything. I rely on real people to get that done right.

Q. And, if I understand correctly, you were actually appointed by the Governor to the Secretary of State position?

A. That's correct.

Q. When was that?

[7]

A. I was sworn in on December 16th, 1994.

Q. And just briefly I assume -- well, you have a legal degree. Where did you go to college?

A. I went to school at Mizzou most of the time undergrad and for law school entirely at Columbia.

Q. What was your degree in undergrad at MU?

A. Political science.

Q. When did you get that?

A. 1972.

Q. And when did you get your JD?

A. '75.

Q. Let me show you --

MR. LOMBARDI: Let's go ahead and mark that as Exhibit 1.

(WHEREUPON, EXHIBIT NO. 1 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q. (By Mr. Lombardi) Ms. Cook, I've placed before you what's been marked as Deposition Exhibit No. 1 for your deposition and I would represent to you that that is a copy of Article VIII of the Missouri Constitution, Sections 15 through 22. And you understand that those sections are sections relating to the term limits initiative that was passed in 1996?

[8]

A. That's my understanding.

Q. And so that we can be clear through the deposition, when I refer to Article VIII, that will be shorthand for Article VIII, Sections 15 through 22 --

A. Fair enough.

Q. -- of the Missouri Constitution. Another thing, I know that you're a busy person and a person who deals with people often but for the record to be clear here, you need to let me finish my questions before you answer them --

A. I'm sorry. Excuse me.

Q. -- even though --

A. I'm just in a hurry.

Q. I understand. And I often interrupt people myself but for the record to be clear I just need you to wait until I'm finished asking questions before you answer.

A. That's fine.

Q. Very good. Article VIII was adopted by or passed by the Missouri voters in November of 1996, correct?

A. Correct.

* * *

[13]

MS. CROW HALCOMB: Okay.

Q. (By Mr. Lombardi) Now, Ms. Cook, you ran for election in 1996, correct?

A. Yes.

Q. During the election did you take any position on Article VIII?

A. During the election I took no official position on Article VIII at all.

Q. Were you asked about Article VIII during public meetings or questioning from the press?

A. I can't recall any time that I was asked about it before its passage. It may have happened but I can't independently recall anything at this point in time.

Q. During the election did you take any position on federal congressional term limits?

A. No, I did not.

Q. Did you take any position on state term limits?

A. No, I did not.

Q. Do you have a position on federal congressional term limits?

A. I have not taken any position ever publicly.

Q. Well, I mean, what's your belief then? Are you in favor of congressional term limits or are you opposed to them?

[14]

MS. CROW HALCOMB: I will object to the question as not likely to lead to the discovery of admissible evidence in this lawsuit. Her position as to how she feels about term limits is absolutely unrelated to any of the issues raised by Mr. Gralike.

Q. (By Mr. Lombardi) You can still answer the question. The objection is for the Court.

A. I do have a personal position but it does not influence any of my official acts.

Q. What's that position?

MS. CROW HALCOMB: If my client doesn't want to answer the question in this form, I don't think she has to. This has nothing to do with this litigation. This is her personal belief. This lawsuit does not affect any of her personal beliefs and you're asking her to take a political position today in sworn testimony. That's her private information.

MR. LOMBARDI: Well, her personal belief goes to any potential bias or --

MS. CROW HALCOMB: And she has already answered that question, that it has not had any impact on her official duties.

MR. LOMBARDI: Well, this is **[15]** discovery.

Q. (By Mr. Lombardi) Ms. Cook, what is your personal belief in regard to federal congressional term limits?

A. I believe that federal congressional term limits are appropriate only in certain circumstances.

Q. And what would those circumstances be?

A. Only when I think the people believe that someone has stayed too long and they have gone too far in terms of their incompetency. I have not ever established any opinion -- fixed opinion about what those limits would actually be.

Q. I assume you voted in the November '96 election?

A. Yes, I did.

Q. Did you vote in favor of Article VIII or against Article VIII?

MS. CROW HALCOMB: I think that's private information. That is not discoverable. Asking her how she voted is absolutely irrelevant to this litigation.

A. I voted against this and I'll tell you that because I thought the bill was poorly worded.

Q. (By Mr. Lombardi) And specifically what about it -- were there specific sections that you **[16]** thought were poorly worded?

A. Well, I think that the bill as a whole is indistinct in offering any kind of process for someone in my position to follow through with it.

Q. So, if I understand what you're saying, it doesn't give you enough direction to determine how to administer the bill. Is that what you're saying?

A. Well, I think it puts me in an untenable position for the reason that I will have to make those determinations without the bill -- the amendment, excuse me, being more distinct about it and that places me in a position to be sued from either side at every turn, every decision that has to be made throughout the amendment.

Q. Well -- and I mean --

A. So, that -- and the way I voted has nothing to do with how I really felt about the issue of term limits.

Q. Right. And I understand that. And the vagueness of the bill is -- of the article is a lot of what we're here about.

A. (nods head)

Q. The term limits group is not providing you with....

* * *

[21]

A. -- to Washington to see these positions that might have been taken by the incumbents and things like that. So, there was some general investigation going on early about that. And that's about all I can think of in respect to specific research issues in the early going.

Q. You mentioned litigation in other states. Do you recall which states you were monitoring?

A. Well, all of those that passed the amendment that we have, or something very similarly worded. And we have continued to monitor that, the progress of that litigation.

Q. From time to time your office promulgates regulations in regard to enforcement of state laws or constitutional amendments, is that correct, in regard to elections?

A. No, it is not correct.

Q. I appreciate you correcting me on that then. To promulgate guidelines for candidates on how to comply with the laws, the election laws within the state of Missouri.

A. We try to offer people specific suggestions in response to any request that's made and we do try to in advance of certain specific activities give general understanding, either by a press [22] release or by posting things outside our office or whatever, in order to give people a good understanding of what to expect. But we do not have the authority to pass actual rules and regulations.

Q. Has your office prepared any press releases or any other documents explaining to potential candidates how to comply with Article VIII?

A. No, we have not.

Q. Do you have any plans to prepare any such press releases or guidelines to candidates for compliance with Article VIII?

A. Well, we will be preparing the same thing we did last time, which is kind of an overview of the candidate filing process, and this will be included as part of that. The Article VIII issues will be new versus what we did last time. There are some other changes, too, that affect this particular document that we produced a few days in advance last time of the beginning of candidate filing that was incorporated in a press release. We posted it at both of our offices and tried to make people aware generally of what we thought would be the process by which they would go in terms of candidate filing. [23] This will be part of that piece this year.

MR. LOMBARDI: Miss Halcomb, just for our background, could you get a copy of last year's --

A. Two years ago.

Q. (By Mr. Lombardi) Thank you.

MR. LOMBARDI: -- press release for candidates on these guidelines.

A. I think it's on the Internet.

Q. (By Mr. Lombardi) Okay. Do you have a web page on the Internet yourself?

A. Yes. It's mosl.sos.state.us and all of our press releases are there.

Q. Dating back through the 1996 election?

A. I think so.

MR. LOMBARDI: I'll check to see if it's there. If I can't find it, I'll get back to you on that.

MS. CROW HALCOMB: Okay.

Q. (By Mr. Lombardi) To date have -- has there been any draft as to what you will release or the guidelines that you'll provide to candidates?

A. No, there has not.

Q. Do you have a timetable for preparing those [24] guidelines?

A. No. We don't really work that formally in our office.

Q. That's absolutely fine. Is someone in your office in charge of drafting those guidelines?

A. Jim McAdams as our elections deputy is ultimately responsible for all things associated with candidate filing.

Q. Has there been any discussion in your office of waiting for the Court's decision in this case, in the Gralike case, before preparing those guidelines?

A. Absolutely not. That would be a very dangerous thing to do.

MS. CROW HALCOMB: And, again, you're directing your comments to what she knows?

MR. LOMBARDI: Right.

A. Well, I'm sorry. That's true. I have not participated in any such discussions. It's possible somebody else may have but I certainly hope not.

Q. (By Mr. Lombardi) Well -- and all I want is your knowledge. You don't have to guess what's in other people's minds. Last year do you recall when those....

* * *

[37]

Q. ...that stand out in your mind, before we get into the specifics and we will get into specifics, as being provisions that you have to guess at the meaning of?

A. Well, I of course don't ever want to say I'm going to guess at the meaning of anything but the matter that concerns me, sort of what I think a lot of people have addressed and that is the issue of these votes in Congress. And at what point does a Secretary of State determine that the designation goes on the ballot and does not based on somebody breaking their leg on the way to a vote and not making the vote, et cetera. Lots of different fact situations that we could conjure up that could fly in the face of a literal translation of the actual words in this amendment.

Q. And the article itself doesn't give you guidelines, for example, on how to determine whether someone should get the ballot designation if they break their leg on the way to a vote?

A. There is no escape clause in this amendment that I can find.

Q. So, the answer to my question is, yes, it [38] doesn't give you assistance in that regard, correct?

A. Well, I think there are some other things in there that you could utilize as assistance and it is the overall idea that Congress -- a member of Congress is required to support the language of this amendment and the concept of the term limits as outlined in that language. And that may be some assistance.

Q. Okay. And we'll get into specifics in just a minute here. And, in fact, why don't we just dive in right now.

(WHEREUPON, EXHIBIT NO. 2 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q. (By Mr. Lombardi) Ms. Cook, I've placed in front of you what's been marked as Exhibit 2 to your deposition. That is a copy of Article VIII that's been provided to me by your counsel. I want to ask you some specific questions about it. First, have you seen this copy of Article VIII before?

A. Yes, I have.

Q. And this Exhibit 2 is in fact Article VIII, correct?

A. It appears to be a photocopy of our own [39] Constitution of Missouri publication for the Secretary of State's office.

Q. Which we've previously defined in the deposition as Article VIII?

A. Yes. These pages include Article VIII.

Q. If you would look at Article VIII, Section 17, subsection (2)(a), and it talks about --subsection 2 starts off saying, "All primary and general election ballots shall have printed the information 'Disregarded Voters' Instructions On Term Limits' adjacent to the name of any United States Senator or Representative who: fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote." In reading that, is it your understanding that the ballot designation would be placed next to a Representative's name if he or she abstains from a vote on the term limits amendment?

MS. CROW HALCOMB: I would object to an improper hypothetical. Furthermore, this is information regarding incumbents. Mr. Gralike is not an incumbent. These issues are not issues raised by your lawsuit. The witness can answer to the extent that she has knowledge. [40] Calls for speculation and legal conclusion.

Q. (By Mr. Lombardi) You're in charge of enforcing this amendment, Article VIII, correct?

A. I am in charge of enforcing -- I guess enforcing it may not be a good term, though, Gregg.

Q. What's the language here? It says you're responsible to make accurate determinations as to whether a candidate for the Federal Legislature shall have the ballot designation put next to their name, correct?

A. That's what this says.

Q. And certainly that's your understanding of Article VIII?

A. I consider myself ultimately responsible to determine designations with respect to congressional candidates.

Q. And in making that determination, if someone abstains from a vote on the term limits, will they be designated as having disregarded voters' instructions on term limits?

MS. CROW HALCOMB: Same objections.

A. And I haven't reached an ultimate conclusion about that because I am waiting a complete review of all the facts with respect to any one candidate.

* * *

[77]

...candidate filing piece where we will pronounce in this document that we provide a press release what will transpire with respect to candidate filing.

Q. And you'll say in that press release where you will make the decision and how you'll publish that decision?

A. Right. Now, admittedly, it's also part of our bill that we are submitting to the Legislature and, if the Legislature passes it, then this will be clear at that point in time.

Q. Has your office published any requests for public comment on whether candidates are to receive the designation or not?

A. Not that I'm aware of.

Q. Do you anticipate holding any hearings on that issue?

A. I have no plans for that at this point in time.

Q. Has there been any contact between your office and the Missouri Supreme Court to establish a procedure for hearings before the Missouri Supreme Court of challenges to your determinations?

A. No.

Q. Has your office made any formal request to the [78] Missouri Attorney General's office for any interpretation of Article VIII?

A. No.

MS. CROW HALCOMB: Objection as vague and ambiguous.

Q. (By Mr. Lombardi) Is it your understanding --or, rather, your reading of Article VIII that any challenge to Article VIII must be filed in the Missouri Supreme Court?

A. There is a provision for a right to appeal and it is my understanding that the Supreme Court can hear appeals, and that is set forth in Section 19, subsection (7).

Q. Is it your reading of Article VIII that any challenge to the article must be brought in the Missouri Supreme Court?

MS. CROW HALCOMB: I would object as calling for a legal conclusion and it is speculation.

A. I have to say that I don't think that I see anything that specifically states it's exclusive but I haven't looked at the laws of legal interpretation -- statutory interpretation in a good long while and I'm not sure what that really means.

[79]

Q. (By Mr. Lombardi) There is a provision, let's see, that says that if a candidate doesn't file a challenge to your determination within five business days in the Missouri Supreme Court, they will have waived any right to appeal your decision, correct?

A. Interestingly enough, in subsection (5) it says that. But in subsection (6) it is not the same. So, depends on which way the designation goes.

Q. I'm looking at subsection (6) and it says that candidates may appeal such decision within five business days to the Missouri Supreme Court as original acts or shall waive any right to appeal such decision.

A. Well, I don't think that it's specifically exclusive there, although, I don't know what that really means in terms of a legal interpretation. Please don't take my word on that.

Q. Sure. But as far as administering the article, if a candidate, for example, files an appeal of your determination in United States District Court in Missouri, does it within five days, will you act -- take action assuming that the **[80]** candidate has waived their right to appeal?

MS. CROW HALCOMB: I will object. Calls for speculation, it's an improper hypothetical and calls for a legal conclusion.

A. I have no opinion on that at this point in time, that's for sure.

Q. (By Mr. Lombardi) You haven't made any decision as to how you'll act on that?

A. Not only that. I'm not sure that that will be my decision to make at all.

Q. From your reading of Article VIII, does Article VIII regulate the time of elections at all?

A. The time of when the election shall occur?

Q. Right.

A. I don't see any way it has any affect on that.

Q. And I agree with you on that. Does Article VIII regulate the manner of elections at all?

A. Not that I see it does.

Q. Does it regulate the place of elections at all?

A. Not that I note anywhere.

MS. CROW HALCOMB: I want to be specific. We're talking about the Article VIII that we have designated as Sections 15 through 22?

MR. LOMBARDI: Right.

[81]

I'm at a good breaking point right here so if you want to break right now, that would be great.

MS. CROW HALCOMB: How much do you have to cover?

MR. LOMBARDI: We have to go over the specific document. I would say an hour and a half or two.

MS. CROW HALCOMB: I don't know that I can do that. Our original agreement was for two hours. We produced Secretary Cook for two hours.

MR. LOMBARDI: And how far --

MS. CROW HALCOMB: How much longer? Can you be specific? Are you going to need --

MR. LOMBARDI: I can't be specific but I would say -- I mean, I'll shoot for an hour and a half, two hours. I'm going to do my best to be fast and in the time that you're away I'll go back through my questions and try to winnow out any that aren't needed.

MS. CROW HALCOMB: We can try to be back by 1:30. Is that acceptable to you, Secretary?

THE WITNESS: I'd like to do that if **[82]** we can do that. I'll cut my stuff short and just get back and we'll do what we can as quickly as we can.

(Whereupon, there was a lunch recess.)

(WHEREUPON, EXHIBIT NO. 3 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q. (By Mr. Lombardi) Ms. Cook, I placed before you what's been marked as Exhibit 3 for your deposition and that is a copy of a newspaper article in regard to the term limits amendment. And it quotes you. Were you interviewed at some time apparently in early 1997 by a Mr. Wolfe in regard to the term limits amendment?

A. My best recollection about this -- and I didn't see this article when it came out until several months later, apparently, was when I first saw it. But my best recollection is that he carried on a discussion with me when we had a press conference on something else so I didn't realize I was truly being interviewed. But that's okay. That's the way the press is, right?

Q. And it quotes you in the third paragraph as saying -- it refers to the term limits amendment is not well considered. not well written. Did you make that statement?

[83]

A. I'm certain I did.

Q. Are there ways in which it's not well considered and not well written other than what you've testified about this morning?

A. I probably could go through it and say that there are other ways but the real problem is that there is no guidance in my mind for a process as the person who is supposed to apply this amendment. That's my real concern with it primarily.

Q. And when you say there's no guidance for a process, you mean a process for determining who will get the designation placed next to their name, correct?

A. Yes. And other processes. I mean, ultimately that's where we're headed, do they get the designation or don't they, but there are several different steps that are taken in there that seem to be indefinite.

Q. Can you tell me what those steps that you're talking about are?

A. Well, I think in the -- in the application process for signing up as a candidate there's some question about -- there could be some question about the pledge itself and exactly how **[84]** to go about that. I mean, it's not a huge issue. That's probably the least troublesome from my standpoint.

Q. Just to nail that one down, are you talking about the issue of whether a non-incumbent actually declines to take the pledge? I think in the legislation there was some discussion --or it may have been the memo that went with the legislation could have interpreted -- the article could be interpreted so that if a candidate who was a non-incumbent just refused or didn't take any action in regard to the term limits pledge, then it would be hard to tell whether or not the designation should be put next to his or her name, is that correct?

A. Well, there is a distinct statement in there about that, yes.

Q. I'm sorry to interrupt you.

A. That's probably maybe the easiest one. It goes on and on in all of these subparagraphs on the issue with respect to the incumbents. Of course, we've kind of gone through that. It makes it very difficult for us to feel that we can pick a paragraph and make a proper and appropriate determination from just picking out **[85]** a paragraph. I recognize that that's true in a lot of legislation. At the same time, I, as Secretary of State, would have appreciated having a stronger procedure established within the amendment itself.

Q. And stronger guidance to you?

A. Clearly. Procedure, guidance, call it whatever you may. It would have been better for me had I been told exactly what to do.

Q. And you testified this morning about trying to make determinations based on the spirit of the article. Does Article VIII, from your reading of it, provide clear, objective measurements for you to determine whether the ballot designation will be placed next to a candidate's name when they abstain from a vote on the term limits amendment?

A. There's no way you could read in here and get an answer to that question I don't think.

Q. Does Article No. VIII -- Article VIII provide clear, objective measurements for you to make a determination whether the ballot designation will be placed next to a candidate's name if they abstain from a vote on a term limits amendment?

[86]

MS. CROW HALCOMB: I object. We've asked this morning. Asked and answered.

A. I think that's so, that we've definitely answered that question and I just don't think there's much way -- as I said this morning, I don't think that we can. And I said this with respect to everything also this afternoon, on each of these paragraphs, I dont think it's safe for me to just read one and say that's the ultimate answer right there.

Q. (By Mr. Lombardi) You mean the ultimate answer as to whether or not -- if they comply with that one provision or don't comply with that one provision, whether the ballot designation will be placed next to their name?

A. Clearly whether they comply, that's not good enough because each one of these has an o-r at the end of it. But if they do comply, it's still is an issue of did they comply adequately and you still get into that indefiniteness that bothers all of us.

Q. Does Article VIII provide clear, objective measurements whether -- clear, objective measurements for you to determine whether the ballot designation will be placed next to a **[87]** candidate's name if they vote for some term limit amendments but not all term limit amendments that are placed before them?

MS. CROW HALCOMB: I will object again as asked and answered.

A. If I understand fully your question, I think I'm going to say that I haven't made an ultimate decision about that. But, in reality, the way I look at it today is, I think I've got to go beyond that to make an ultimate determination. Is that a fair characterization for you?

Q. (By Mr. Lombardi) And before you talked about, again, the spirit of the article as opposed to the specific language of the article and what I'm asking is, in the specific language of the article, is there a clear, objective measurement for you to make that determination of, say, for example, if a legislator votes for the term limits amendment three times but doesn't vote for it a fourth time?

A. A fourth time?

Q. Does the article provide you with clear, objective measurements for you to make the determination of whether the ballot designation will be placed next to that candidate's name?

[88]

MS. CROW HALCOMB: I'll object as an improper hypothetical. It calls for speculation and calls for a legal conclusion.

A. Of course, this doesn't address that fact situation.

Q. (By Mr. Lombardi) And, so, the answer is that it doesn't provide such clear, objective measurements, correct?

A. Not as to three votes in favor and one vote against.

Q. Does Article VIII provide clear, objective measurements for you to determine whether the ballot designation will be placed next to the candidate's name who doesn't propose the amendment in every session of Congress?

MS. CROW HALCOMB: Objection. Calls for an improper hypothetical, calls for speculation and draws a legal conclusion.

A. I think I answered that this morning but also I will say I'm today taking the position that it is not adequately addressed here. There are a lot of people who feel differently and feel it's very clear. So, this is just my personal opinion.

Q. (By Mr. Lombardi) Sure. Although you are the **[89]** person who has to implement the article. Ms. Cook, does the article provide clear, objective measurements for you to determine whether or not the ballot designation will be placed next to a candidate's name -- scratch that. I had a really good buildup.

MS. CROW HALCOMB: One more gone. Moving along.

Q. (By Mr. Lombardi) Does Article VIII provide clear, objective measurements for you to determine what it means for a candidate to reject the laws of term limit amendments?

MS. CROW HALCOMB: Objection. Calls for an improper hypothetical, calls for speculation and asks for a legal conclusion.

A. Basically, that's in the same category of what I've been answering and that is that reasonable persons could disagree on that point I think. And my view of it is that I would not ever want to make a decision based upon that simple statement within the framework of this amendment.

Q. (By Mr. Lombardi) Does the amendment provide clear, objective standards for you to determine how public comments will be used to determine **[90]** whether the ballot designation will be placed next to a candidate's name?

A. Again, I answered that this morning but not only -- I not only feel that it does not but I also think it would be inappropriate if it did. And I think I told you that this morning as well.

Q. Back to Exhibit 3. In Exhibit 3, the bottom of the first column on the left there it says that you asked the Legislature for $40,000 for monitoring for purposes of implementation of Article VIII. What was that money needed for?

A. Well, that would be something I would say probably wasn't very distinct in this article. And in my mind the $40,000 involved staff, the cost of staff and also the cost of travel and expenses in determining the records basically of the incumbents. But it also involved a lot of other things from my perspective in terms of the legal time and all that in our office and concerns about that. And in fact of that 40,000 in the request, the fiscal -- well, whatever you call it, the fiscal note, it identified some attorney time and we ended up absorbing that by the hire of the corporate attorney that we were given this year as an additional person on the **[91]** staff. And I had noted that that would be absorbed. So, you know, it's not a new $40,000. It is how much staff does it take for you to accomplish this.

Q. Okay. In the legislation that you're putting before the General Assembly this year are you also asking for more funding?

A. I'm certain we are. We haven't gotten to the fiscal note process of this bill this year and that would be a little change from last year because we've got the new corporate counsel and that frees up additional people for our current general counsel.

Q. So, the request for funding would be less than it was last year?

A. Well, actually, the request for funding this year is almost irrelevant because -- at least for this year it is because clearly we're going to be handling this in this fiscal year and what occurs next year is next year and the fiscal note's sort of irrelevant to us. We'll do it because we need to inform the General Assembly of the cost of any bill but it would certainly be more of an issue for two years down the road and I'd want to go through one of these **[92]** processes before I felt really comfortable to know where we are on that.

Q. So, your office is just going to have to divert money from something else to pay for the administration of this?

A. It doesn't divert so money so much as it's diverting staff time and it's just a real problem for us in managing all of the issues that we have to address in our office.

Q. Looking at this Exhibit 3, on the second column it quotes you saying the amendment could be read so strictly that someone filibustering an agricultural bill could be accused of trying to keep term limits from being considered. Is that an accurate quote of you?

A. I don't remember. Probably is. I certainly wouldn't question Jim Wolfe's quote of me. And, of course, that is just referring to how some people would look at it and try to make it into something that they want as a result.

Q. You don't have any reason to believe that that's an inaccurate quote of you?

A. No, I certainly don't. I think it is an accurate quote of me. I just don't independently remember it right now.

* * *

[101]

Q. ...Article VIII, which is Exhibit 2 before you, if you can just read that over to yourself for just one second. Or however long it takes you to read it.

A. (complies)

Q. Do you consider that term limits pledge to be contractual in nature?

MS. CROW HALCOMB: Objection. Calls for a legal conclusion.

A. I think it's immaterial what I think about what it is. I think it's a ministerial statement of what somebody's supposed to sign if they want to avoid a designation on the ballot.

Q. (By Mr. Lombardi) Has there been any discussion in your office as to whether your office or the State of Missouri could take legal action to enforce that pledge if a candidate doesn't abide by it?

MS. CROW HALCOMB: Objection. Calls for speculation.

A. There's been no such discussion.

Q. (By Mr. Lombardi) That pledge says that the candidate pledges to support term limits and to use all my legislative powers to enact the proposed constitutional amendment. What does **[102]** the term, "all my legislative powers" mean?

MS. CROW HALCOMB: Objection. Calls for a legal conclusion.

A. Again, for me it would mean that I do my best effort, if I were signing this pledge, but obviously it can mean something very different to the next person who's making the pledge

Q. (By Mr. Lombardi) Does Article VIII from your reading of it provide a clear, objective standard as to what "all my legislative powers" means as it's used in the term limits pledge?

MS. CROW HALCOMB: Objection. Calls for speculation. Calls for a legal conclusion.

A. I don't see any definition in this amendment.

Q. (By Mr. Lombardi) Do you believe that the term limits -- or, rather, the ballot designation would handicap the candidates who have that designation placed next to their name?

A. I think that most people believe it would and I certainly would assume that if the polling is as strong as people claim it is and all this sort of thing. It would have an affect on the populace when they came in to vote if they don't have other information.

Q. And the affect on the populace that you think it **[103]** would have would be negative to the candidate that had that designation next to their name?

A. That's what my understanding the polling is showing.

Q. What polling are you referring to?

A. And, again, I don't have anything that I've read that says this. I just understand that term limits is very poplar, that the concept of term limits is very popular with Missouri voters and that is of course evidenced by the strong vote in favor of this amendment last year I think.

Q. Are you aware of any compelling state interest that is served by Article VIII?

MS. CROW HALCOMB: Objection. Calls for a legal conclusion.

A. Well, I think if the public wants something, that's a compelling interest. I believe very strongly in our Democracy and the fact that people should be able by the initiative process have access to creating a law which follows their desires. If the Legislature won't provide it to them, they have this other outlet in Missouri and I think it's a valuable asset for us. It is an issue of giving people their own chance and their own shot at getting government **[104]** to respond to them. I don't know if that adequately answers your question but I feel pretty strongly about that.

Q. And the will of the Missouri people as you see it embodied in Article VIII is to have a constitutional term limits amendment, is that correct?

A. Clearly, they voted in favor of this amendment. They want this amendment.

Q. And it's your understanding of the purpose of the amendment that there be a federal constitutional term limits amendment, is that correct?

A. That's what it says I think in essence.

Q. Yes. In regard to the ballot designation that we've been talking about, is there any plan by you or anyone in your office to put any explanation on the ballot as to what "disregarded voters instructions on term limits" means?

A. We haven't discussed this but I can say that today there would be -- there certainly is no plan and I don't think we would do that. We

would need to have authority from the Legislature or this petition to do anything....

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Caption Omitted]

DECLARATION OF MIKE HARMAN

I, Mike Harman, declare under penalty of perjury that the following is true and correct:

1. I am a citizen of the United States of America.

2. I am over the age of twenty-five and I have been a resident of the State of Missouri for more than seven years.

3. I am a candidate in the upcoming election for the House of Representatives of the United States Congress (the "House"). I have also previously been a registered candidate for election to the House.

4. I filed a timely registration to run for the House with the Missouri Secretary of State's office. Accordingly, my name will appear on the ballot for that election.

5. I oppose the proposed constitutional amendment contained in Article VIII of the Missouri Constitution, which was adopted by popular vote in November of 1996 and believe that having the designation "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" placed next to my name on the election ballot would hurt my chances for election to the House.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ [Mike Harman]
Mike Harman
6-3-98

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Caption Omitted]

DECLARATION OF DONALD GRALIKE

I, Donald James Gralike, declare under penalty of perjury that the following is true and correct:

1. My name is Donald J. Gralike and I am the plaintiff/appellee in the case captioned Gralike v. Cook.

2. In February I became a candidate for the U. S. Congress in the seat currently held by Richard Gephardt.

3. I have withdrawn from the election effective May 18, 1998 and my name will not appear on the ballot. I have reached this decision entirely independent of this litigation.

4. After giving the matter further consideration, I have withdrawn with the hope that my withdrawal from this year's election will further solidify support of my candidacy in the year 2000. I have been a longtime Democrat and supporter of Representative Gephardt. I believe Representative Gephardt's support will be critical for my 2000 candidacy. In order to make it more likely that I will receive Richard Gephardt's and his associates' support in the 2000 election, I have withdrawn from the race.

5. I think there is a strong probability that Representative Gephardt will be a candidate for President in the year 2000. I believe his chances of election are excellent, therefore, it seemed in my best interest to wait until the year 2000 to have a fully engaged campaign for U. S. Congress.

6. I do want to run for Congress in the event Representative Gephardt seeks other office or his seat otherwise becomes available.

7. I have every intention of seeking this Congressional Seat as soon as it is vacant. I declare under penalty of perjury that the foregoing is true and correct.

/s/ [Donald James Gralike]
Donald James Gralike

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

(5)

No. 99-929

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

REBECCA McDOWELL COOK,
Petitioner,
v.
DONALD J. GRALIKE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor

JAMES R. McADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

* *Counsel of Record*

58pp

QUESTIONS PRESENTED

I.

Do the people violate Article V of the Constitution when they participate in the evolution of their government by communicating their opinion to federal legislators or by commenting on the ballot to themselves about the behavior of federal legislative candidates?

II.

Do the people violate the Qualifications Clauses and the First Amendment when they comment on the ballot regarding their elected representative's actions and voting record or when they comment on the ballot about a non-incumbent congressional candidate's silence concerning a prospective constitutional amendment?

III.

Does the Speech and Debate Clause of the Constitution prohibit the people from commenting on the ballot about their federal legislator's actions and voting record in regard to a prospective constitutional amendment?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption except Michael Harmon, the 1998 Libertarian Party candidate for Missouri's Seventh Congressional District, who intervened as an appellee in the United States Court of Appeals for the Eighth Circuit after Donald Gralike withdrew as a candidate for the House of Representatives.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. Nothing in the history, text, or spirit of Article V prohibits the people from participating in the evolution of their government by communicating their opinion on a prospective amendment to congressional candidates or by commenting on the ballot about the behavior of these candidates. 9

A. American history is replete with examples of citizens instructing their legislators. 10

1. Early examples of citizen instruction. 11

2. Post-Civil War examples of citizen instruct and inform provisions. 14

B. Because they are merely advisory, the people's actions do not run afoul of either *Hawke* or *Leser*. 17

C. In other contexts, the Court has found the instruction of otherwise independent legislators and delegates to be constitutional. 23

II. The people of Missouri did not create a new qualification for service in Congress by merely commenting on the behavior of congressional candidates. 25

III. The people of Missouri do not violate the First Amendment by simply commenting on the behavior of congressional candidates. 29

A. Article VIII does not abridge a candidate's free speech rights because it does not compel speech. 29

B. Article VIII does not abridge a candidate's free speech rights because the candidate remains free to speak or remain silent; the people simply

comment on the candidate's behavior. 32

C. Even if Article VIII has a slight impact on candidate speech, that impact cannot outweigh the overwhelming interest of Missourians in communicating with and receiving information about their public officials. 35

D. Article VIII is narrowly tailored to advance the people's compelling interests. 40

IV. The Speech and Debate Clause does not insulate public officials from the will of their constituents. 42

CONCLUSION 46

TABLE OF AUTHORITIES

CASES **Pages**

Anderson v. Celebrezze, 460 U.S. 780 (1983) 39

Anderson v. Martin, 375 U.S. 399 (1964) 28

Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D. S.D. 1998) .. 10

Baxter v. Palmigiano, 425 U.S. 308 (1976) 34

Bramberg v. Jones, 978 P.2d 1240 (Cal. 1999) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 39-41

Burdick v. Takushi, 504 U.S. 428 (1992) 35, 36

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 21

Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 13

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 37

Clements v. Fashing, 457 U.S. 957 (1982) 26

Davis v. Hildebrandt, 241 U.S. 565 (1916) 38

Dillon v. Glass, 256 U.S. 368 (1921) 19

Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996) 10

Foster v. Love, 522 U.S. 67, 118 S.Ct. 464 (1997) 29

Fullilove v. Klutznick, 448 U.S. 448 (1980) 36

Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999) ..... *passim*

Gravel v. United States, 408 U.S. 606 (1972) 8, 43, 44

Hague v. Committee for Industrial Organization,
307 U.S. 496 (1939) 38

Hawke v. Smith, 253 U.S. 221 (1920) 17-19

In re Initiative Petition No. 364,
930 P.2d 186 (Okla. 1996). 10

In re Matter of Impeachment of Moriarty,
902 S.W.2d 273 (Mo. 1994) 44

Kimble v. Swackhamer, 439 U.S. 1385 (1978). . 10, 19, 20, 23

League of Women Voters of Maine v. Gwadosky,
966 F. Supp. 52 (D. Me. 1997) 10

Leser v. Garnett, 258 U.S. 130 (1922) 17-19

Miami Herald Pub. Co., v. Tornillo,
418 U.S. 241 (1974) 30-32

Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) ... 5, 10, 20

Mills v. State of Alabama, 384 U.S. 214 (1966) 35, 39

Morrissey v. State of Colorado,
951 P.2d 911 (Colo. 1998). 10

Nixon v. Shrink Missouri Government PAC,
___U.S.___, 120 S.Ct. 897 (2000) 35, 36

Ohio Adult Parole Authority v. Woodard,
523 U.S. 272 (1998) 34

Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.,
475 U.S. 1 (1986) 31

PruneYard Shopping Center. v. Robins,
447 U.S. 74 (1980) 33, 37

Ray v. Blair, 343 U.S. 214 (1952) 24, 25

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 31

Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997) 10

Stanley v. Georgia, 394 U.S. 557 (1969) 35, 39

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 22, 28, 39

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 28, 35, 36

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 2, 7, 26-28, 38

U.S. v. Helstoski, 442 U.S. 477 (1979) 44

U.S. v. Johnson, 383 U.S. 169 (1966) 43

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 31

Wooley v. Maynard, 430 U.S. 705 (1977) 30-33, 35, 37

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I, § 2 ..... 4, 5, 7, 26, 27

U.S. Const., art. I, § 3, cl. 3 ..... 4, 5, 7, 26, 27

U.S. Const. art. I, § 3, cl. 1 15

U.S. Const. art. I, § 4 ..... 28, 38

U.S. Const. art. I, § 6 ..... 5, 8, 42-45

U.S. Const. art. V ..... *passim*

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IX 25

U.S. Const. amend. X 25

U.S. Const. amend. XII 23, 24

U.S. Const. amend. XVII 23

U.S. Const. amend. XXI 17

Mo. Const. art. VIII, §§ 15-22 ..... *passim*

STATUTES

28 U.S.C. § 1254 (1) (1993) 2

42 U.S.C. § 1983 4

SCHOLARLY AUTHORITIES

2 *Elliot's Debates* (Jonathon Elliot ed., 1836) 12

Vikram D. Amar, *The People Made Me Do It: Can the People of the State Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037 (2000) 16, 18

Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (1993) 14

Alexis De Tocqueville, *Democracy in America* (J.P. Mayer ed. & George Lawrence trans., 1969) 9

Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* (1990) 12-13

Friends of the Constitution: Writings of the "Other" Federalists 1787-1788 (Colleen A. Sheehan and Gary L. McDowell eds., 1998) 13

Kris W. Kobach, *May "We The People" Speak?: The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. Davis L. Rev. 1, (1999) 11-13, 17

David E. Kyvig, *Explicit and Authentic Acts, Amending the U.S. Constitution*, 1776 - 1995 (1996) 14, 15

Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677 (1993) 18

Ronald D. Rotunda, *The Aftermath of Thornton*, 13 Const. Comment. 201 (1996) 15, 16

OTHER AUTHORITIES

The Declaration of Independence (U.S. 1776) 11-12

The Federalist No. 43 (James Madison) (Clinton Rossiter ed., 1961) 9

Official Manual of the State of Missouri 1997-1998 (Jim Grebing ed. 1997) 21

Statement 43 Cong. Rec. E277-02 (1997) (statement of Rep. Emerson) 23

Supreme Court Rule 14 2

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

No. 99-929

REBECCA McDOWELL COOK,
Petitioner,

v.

DONALD J. GRALIKE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Petition Appendix ["P.A."] A1-35), entered on August 31, 1999, is reported at 191 F.3d 911. The opinion of the district court granting Gralike summary judgment (P.A. A27-35) is reported at 996 F.Supp. 917 (W.D. Mo. 1998); the two district court orders denying petitioner's motions to dismiss (P.A. A36-81) are not reported.

JURISDICTION

The court of appeals entered its judgment on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1993) and pursuant to Supreme Court Rule 14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are Article I, Section 2, Clause 2; Article I, Section 3, Clause 3; Article I, Section 4, Clause 1; Article I, Section 6, Clause 1; Article V; and Amendment I. The provisions of the Missouri Constitution involved in this case are Article VIII, Sections 15-22. These provisions are set forth in the petition for writ of certiorari. Cert. Pet. 2-8.

STATEMENT OF THE CASE

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (*Thornton*), this Court informed the people of the various states that the only way to enact term limits for members of Congress was by amending the Constitution. The citizens of Missouri took this admonition to heart. Thus, on November 5, 1996, they approved an initiative measure amending Article VIII of the Missouri Constitution to add sections 15 through 22.[1]

In sections 15 and 16, the people of Missouri responded to the Court's instructions in *Thornton* by declaring their

[1] For convenience, petitioner will refer to Article VIII, sections 15 through 22 collectively as "Article VIII."

intention to support the adoption of a particular amendment to the United States Constitution placing limits on the number of terms which an individual could serve in Congress. In section 17, clause 1, the voters instructed the members of Missouri's congressional delegation to use their powers to pass the congressional term limits amendment included in section 16. The people provided that any member of Congress who failed to engage in eight specified behaviors during the term preceding the election would have the phrase "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed next to his or her name on the next primary and general election ballots. Art. VIII, § 17(2)(a-g).

In section 18, the people offered all non-incumbent candidates for Congress the opportunity to pledge support for the term limits amendment set forth in section 16. The pledge was not mandatory, and a non-incumbent candidate's silence in the face of the opportunity to take the pledge would not prevent the candidate from being on the ballot. Rather, if a candidate responded to the opportunity with silence or affirmative declination, the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" would be printed adjacent to the candidate's name on the primary and general election ballots.

The remaining provisions were procedures for the proper implementation of Article VIII. In section 19, the people gave Missouri's Secretary of State the ministerial task of informing the people about a candidate's behavior. Section 20 authorized an automatic repeal of sections 15-22, when the congressional term limits amendment in section 16 became a part of the United States Constitution. Section 21 granted the Missouri Supreme Court original jurisdiction to hear challenges to Article VIII. And section 22 contained a severability clause

which, in the event any provision of Article VIII was found to be unconstitutional, would sever the unconstitutional provision from the remainder of the amended Article.

A scant thirty-five days after the populace expressed its will, Donald Gralike, at the time an undeclared, non-incumbent candidate for the United States House of Representatives, filed suit under 42 U.S.C. § 1983 in the United States District Court for the Western District of Missouri challenging the constitutionality of the people's actions. Joint Appendix ("J.A.") 3-14 . Gralike named as the defendant the Missouri Secretary of State, Rebecca McDowell Cook, in her official capacity. J.A. 3, 4. He claimed Article VIII: (1) added qualifications for service in Congress in violation of the Qualifications Clauses; (2) was unconstitutionally vague; (3) violated the Supremacy Clause; (4) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment; and (5) deprived him of his First Amendment rights. J.A. 7-14.

After denying most of petitioner's two motions to dismiss[2] (P.A. A36-81), the district court granted Gralike summary judgment on February 18, 1998. P.A. A35. The court concluded that Article VIII: (1) added qualifications for service in Congress in violation of the Qualifications Clauses by commenting on a congressional candidate's behavior; (2) violated the First Amendment right to free speech of candidates for Congress by commenting on their statements, actions, or silence; and (3) usurped Congress's Article V power to amend

---

[2] The district court, on Eleventh Amendment grounds, dismissed Gralike's additional claim that Article VIII violated the Missouri Constitution. P.A. A75-77 & 81. Gralike did not appeal.

the Constitution by allowing the people to propose a constitutional amendment. P.A. A27-35. Cook filed a timely notice of appeal.

On August 31, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the district court. The majority agreed with the district court and concluded that Article VIII: (1) added qualifications for members of Congress in violation of the Qualifications Clauses by commenting on the behavior of congressional candidates; (2) violated the First Amendment right to free speech of congressional candidates by commenting on their statements, actions, or silence; and (3) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment. P.A. A1-23. The court of appeals also reached an issue not raised by either party: it determined that Article VIII violated the Speech and Debate Clause of the Constitution by allowing the citizenry to comment on the official acts of members of Congress. P.A. A14-15.

Circuit Judge Hansen concurred in part and dissented in part from the majority's holding. He concurred in the holding as to the labeling provisions in Article VIII, sections 17, 18 and 19. But he would have left the remaining portions of Article VIII untouched, similar to an earlier decision by another Eighth Circuit panel in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999). Judge Hansen observed that sections 15 and 16 were only advisory, and thus constitutionally sound. Judge Hansen "believe[d] the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I." P.A. A24. The judge continued:

In fact, "We the People" have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment procedures set out in Article V. However, the people play a crucial, substantive role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures.

P.A. A24-25.

Petitioner filed a Petition for Writ of Certiorari in this Court seeking to correct the decisions of the district and circuit courts. On April 17, 2000, this Court granted the petition. J.A. 2.

SUMMARY OF ARGUMENT

On November 5, 1996, the people of Missouri declared that it was time to amend the United States Constitution. The people spoke by approving an initiative petition placing an "instruct and inform" provision in the Missouri Constitution. But the United States Court of Appeals for the Eighth Circuit nullified the action of the citizens of Missouri, determining that the United States Constitution forbids citizens from advising their elected officials about the need to propose and ratify a particular constitutional amendment. This ruling was in error

because the Constitution does not deprive the people of the right to participate in their government; it preserves it.

The Eighth Circuit held that the people's instruction – and their plan to inform each other regarding their congressional delegation's compliance with the instruction – violated Article V of the Constitution. But Article V does not prevent the people from participating in the development of their own government. In fact, citizen instructions were common both before and after the adoption of the Constitution. The people's instruction does not subvert the mechanisms of Article V. Missouri's congressional delegation will perform all the functions set out in Article V; they will simply do so with an awareness of the people's wishes.

Despite the circuit court's holding to the contrary, Missouri's Article VIII does not create an additional qualification for service in Congress. In *Thornton* the Court developed a two-part test to determine whether a law created an additional qualification for congressional service. An un-constitutional additional qualification is created by a law that disqualifies a class of candidates *and* has the sole purpose of indirectly creating an additional qualification. 514 U.S. at 835-36, n. 48. Article VIII does neither. That some voter "might," in the opinion of the Eighth Circuit, be affected by ballot information does not create a constitutionally impermissible handicap. Nor did the people intend solely to create an additional qualification for service in Congress by passing Article VIII. Instead, they simply intended to comply with the Court's directive in *Thornton* and promote the amendment of the Constitution. Nothing in the people's enactment violated the Qualifications Clauses.

The Eighth Circuit also held that Missouri's Article VIII violated the First Amendment by compelling the speech of congressional candidates. But the Article compels nothing. Instead, it merely provides for comment by the citizens on the behavior of their congressional candidates – an exercise of the people's First Amendment rights. The Eighth Circuit never considered this right of the people. Nor did it bother to balance the people's rights against those of the candidates. Though such a balance is unnecessary because Article VIII compels nothing, the people's fundamental interest in preserving their voice in government outweighs any slight effect Article VIII may have on the free speech rights of candidates for Congress.

Further, Article VIII does not violate the Speech and Debate Clause. The Eighth Circuit said that the Clause deprives the people of the right to comment on the ballot about the behavior of their elected officials. But the Speech and Debate Clause does not rob the people of that right; it merely protects members of Congress from "intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Gravel v. United States*, 408 U.S. 606, 616 (1972). Article VIII does not involve material executive action nor could it prompt impermissible prosecution.

Erroneous decisions, such as the Eighth Circuit's, interfere with the public's right to communicate about the electoral process, frustrate the public will, and undermine America's social contract that provides for the citizenry to determine the form of their government. No provision of the Constitution mandated the Eighth Circuit's interference with the public's right to speak. Unless this Court corrects the circuit court's error, the meaning of various provisions of the

Constitution will continue to be perverted and the people will be further estranged from the government they once ordained. This Court should restore to the people their right to fully participate in their own government.

ARGUMENT

I. Nothing in the history, text, or spirit of Article V prohibits the people from participating in the evolution of their government by communicating their opinion on a prospective amendment to congressional candidates or by commenting on the ballot about the behavior of these candidates.

In drafting the Constitution, the Framers recognized that perfection was unattainable. The need for useful alterations to the Constitution "could not but be foreseen."[3] Thus, the Framers rejected the French idea of an immutable constitution and incorporated a method for amendment into the document[4]:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case,

---

[3] *The Federalist No. 43*, at 278-79 (James Madison) (Clinton Rossiter ed., 1961).

[4] *See* Alexis De Tocqueville, *Democracy in America* 101 (J.P. Mayer ed. & George Lawrence trans., 1969) (comparison of the French and American Constitutions).

> shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. Const. art. V. By its opinion, the Eighth Circuit robbed the people of the opportunity to comment on this process. And the court did so without properly considering the history, text, and spirit of Article V.

A. American history is replete with examples of citizens instructing their legislators.

Since the founding of our country, the people have exercised their right to instruct their elected officials. Missourians continued this tradition by passing Article VIII. And prior to the recent spate of rulings,[5] of which the Eighth Circuit's opinion is but one example, no court had ever found this expressive conduct to be unconstitutional.

---

[5] *See Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998); *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *Morrissey v. State of Colorado*, 951 P.2d 911 (Colo. 1998) and *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (all invalidating instruct and inform provisions on Article V and various othergrounds). *But see Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (instruct provision did not violate Article V); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (instruct provision does not violate Article V); and *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Article V does not prohibit citizens from advising their legislators on a prospective constitutional amendment).

1. Early examples of citizen instruction.

From the earliest days of our country, the people have exercised their right to influence the form of their government. The delegates to the Second Continental Congress from North Carolina, Virginia, New Jersey, and New York were all under instructions to vote for independence.[6] In fact, the delegates from New York considered their instructions to be so important that they read them aloud before the Continental Congress.[7]

The instructed delegates enshrined the right of the citizenry to direct the form of their government in the Declaration of Independence.

> We hold these truths to be self evident, . . . That whenever any Form of Government becomes destructive of these ends *it is the Right of the People to alter or to abolish it*, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

---

[6] *See Independence in North Carolina* (April 12, 1776), reprinted in 5 *American Archives, Fourth Series* 859, 859 (Peter Force ed., 1844); *Records of the Virginia Convention* (May 15, 1776), reprinted in 6 *American Archives, Fourth Series* 1523, 1524 (Peter Force, ed., 1846); *Records of the New York Provincial Congress*, reprinted in 6 *American Archives, Fourth Series* 1364, 1364 (Peter Force, ed., 1846); all cited in Kris W. Kobach, *May "We The People" Speak?: The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. Davis L. Rev. 1, 38-41, 46 (1999) (hereafter Kobach).

[7] Kobach, 33 U.C. Davis L. Rev. at 46.

The Declaration of Independence, para. 2 (U.S. 1776) (emphasis added).

The tradition of citizen instructions continued into the Constitutional Convention. In fact, several Framers were acting pursuant to instructions when they drafted the Constitution. For example, Delaware's delegates were acting under specific instructions to preserve the Fifth Article of the Articles of Confederation that provided each state would receive a single vote in Congress.[8]

The statements of the Framers also indicate that they understood the people possess the right to instruct their members of Congress. As the states considered ratification of the Constitution, the delegates to the Convention reaffirmed the continued availability of the instruction tool. Thus, in reference to a possible future increase in the size of Congress, Alexander Hamilton commented:

> If the general voice of the people be for an increase, it must undoubtedly take place. *They have it in their power to instruct their representatives*; and the State Legislators, which appoint the Senators, may enjoin it also upon them.[9]

---

[8] 3 *The Records of the Federal Convention of 1787* 574-75 (Max Farrand ed., 1966) *cited in* Kobach, 33 U.C. Davis L. Rev. at 56.

[9] Alexander Hamilton, Statement before the New York Ratifying Convention (June 23, 1788), *reprinted in* 2 *Elliot's Debates*, at 252 (Jonathon Elliot ed., 1836) (emphasis added). In their own constitutions, three states heeded Hamilton's statements and their constitutions explicitly guaranteed the right to instruct their representatives. Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution*, at 111 (1990). In the other states, "the right [to instruct] was assumed." *Id.*

Additionally, in reference to the amendment process itself, John Dickinson, a constitutional convention delegate from Delaware, stated:

> For this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations [to the Constitution] respectively required by them, and to enjoin their representatives, to employ every proper method to obtain ratification.[10]

The use of citizen instructions continued unabated after the Constitution, containing Article V, was ratified. Several states instructed their representatives to the first Congress. Members of Congress from Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina arrived bearing instructions as to their vote on the Bill of Rights.[11] And in the wake of *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the legislatures of Massachusetts, Virginia, Connecticut, and North Carolina instructed their Senators to seek a constitutional amendment (now the Eleventh Amendment) that would deny federal courts jurisdiction over suits by citizens against states.[12]

---

[10] John Dickinson, *The Letters of Fabius, Pamphlet No. VII* (1797), *reprinted in Friends of the Constitution: Writings of the "Other" Federalists 1787-1788*, at 496 (Colleen A. Sheehan and Gary L. McDowell eds., 1998).

[11] Kobach, 33 U.C. Davis L. Rev. at 63.

[12] Kobach, 33 U.C. Davis L. Rev. at 70.

Hence, within a few short years of Article V's enactment, at least eight of the original thirteen states had instructed their legislators with regard to various constitutional amendments. Certainly Article V was not thought to prohibit instructions to federal legislators regarding proposed constitutional amendments.[13]

2. Post-Civil War examples of citizen instruct and inform provisions.

This tradition of citizen instruction continued on into the Twentieth Century. For example, prior to the passage of the Seventeenth Amendment, there was much popular resentment against the system of legislatively-elected Senators.[14] Senators were perceived as tools of corporations and the party leadership.[15] To correct these problems, various states requested Congress to propose a constitutional amendment. Not surprisingly, the Senate steadfastly refused to approve such

---

[13] While the early history regarding provisions to inform the electorate of their representatives' behavior in response to citizen instructions is not well developed, the reason for this lack of development is readily apparent. At the time of the Framers, no self-respecting member of Congress would remain in Congress after ignoring the public's instructions. Instead, they would simply retire on their own, thus eliminating any need for an inform provision. In fact, two future presidents, John Quincy Adams and John Tyler, actually did retire from the Senate after ignoring instructions. Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, at 123 (1993).

[14] David E. Kyvig, *Explicit and Authentic Acts, Amending the U.S. Constitution*, 1776 - 1995, at 209 (1996) (hereafter Kyvig).

[15] *Id.*

an amendment.[16]

Stymied in their initial attempts to amend the Constitution, the people of the various states adopted different techniques to effectuate the direct election of senators. For example, in 1904, the people of Oregon, by initiative measure, adopted a system that essentially simulated the direct election of Senators.[17] First the voters, via a primary election, would select their party's senatorial candidate.[18] Then the two candidates would face off in a general election.[19] These elections were not binding. Rather, pursuant to Article I, § 3, cl. 1 of the Constitution, the Oregon Legislature possessed the authority to select the state's Senators. Accordingly, by law, the people required their legislators to sign a pledge agreeing to comply with or a pledge indicating their freedom to reject the people's wishes.[20] Most legislators agreed to support the popular preference, and the deadlock that plagued previous senatorial elections was avoided. In fact, in 1909, the effectiveness of the Oregon system was demonstrated when the state's Republican- controlled legislature quickly selected the people's choice, a Democrat, for the United States Senate.[21]

---

[16] *See* Ronald D. Rotunda, *The Aftermath of Thornton*, 13 Const. Comment. 201, 206-207 (1996) (hereafter Rotunda).

[17] Rotunda, 13 Const. Comment. at 208.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Kyvig, *supra* note 14, at 210.

Oregon was not the only state to develop an alternative method for the selection of Senators. Nebraska pioneered an "instruct and inform" system similar to the one at issue here.[22] In Nebraska, the people also voted on who they wanted to be their Senator. But Nebraska took this system one step further: it printed the results of the pledges on the ballot right next to a candidate's name.[23] Thus, after each candidate's name the ballot either stated, "Promises to vote for the people's choice for United States Senator," or "Will not promise to vote for the people's choice for United States Senator."[24]

Other states followed Oregon's and Nebraska's lead. In 1910, three years before the Seventeenth Amendment was passed, fourteen of the thirty Senators who were to be selected by state legislatures were known in advance because the legislatures had bound themselves to select the senatorial candidates endorsed by popular vote.[25] By 1912, nearly sixty percent of the Senate was selected by the near equivalent of a direct election.[26]

While citizen instructions saw their modern heyday during the debate about the direct election of Senators, passage

---

[22] *See* Vikram D. Amar, *The People Made Me Do It: Can the People of the State Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1069 (2000) (hereafter Amar).

[23] Rotunda, 13 Const. Comment. at 209.

[24] *Id.*

[25] *See* Rotunda, 13 Const. Comment. at 209.

[26] *Id.*; Amar, 41 Wm. & Mary L. Rev. at 1070.

of the Seventeenth Amendment did not bring an end to citizen instructions. In 1928, the voters of Massachusetts, by initiative, instructed their state senators to vote for repeal the Eighteenth Amendment.[27] And in 1933, Oregon held a statewide referendum to determine how the state's delegates to the statewide convention[28] should vote on the ratification of the Twenty-First Amendment. The people voted in favor of ratification and, seventeen days later, the state convention ratified the Twenty-First Amendment.[29]

By passing Article VIII, the people of Missouri continued a noble tradition of citizen involvement in their country's political future. The Eighth Circuit ignored this tradition. *See Gralike*, 191 F.3d at 924-25 (P.A. A19-22). In fact, the court of appeals never even discussed the history of citizen instructions. Rather, it merely misapplied this Court's opinions in *Hawke v. Smith* and *Leser v. Garnett*.

B. Because they are merely advisory, the people's actions do not run afoul of either *Hawke* or *Leser*.

---

[27] *See* 1929 *Mass. Acts* 544-52 (tallying votes of senatorial districts); Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government*, at 476-77 (1930); *both cited in* Kobach, 33 U.C. Davis L. Rev. at 82-83.

[28] The Twenty-First Amendment, unlike any other amendment to the Constitution, was sent to state-wide conventions, not state legislators, for approval. Kobach, 33 U.C. Davis L. Rev. at 86.

[29] 1933 Oregon Laws, 2d Special Sess. 10 (1933); *cited in* Kobach, 33 U.C. Davis L. Rev. at 86-87.

In striking down Article VIII, the Eighth Circuit relied extensively on *Hawke v. Smith*, 253 U.S. 221 (1920) and *Leser v. Garnett*, 258 U.S. 130 (1922). In *Hawke*, the Court struck down on Article V grounds a provision of the Ohio Constitution that gave the people final authority to approve or reject an amendment to the United States Constitution. 253 U.S. 221. In *Leser*, the Court again held that the actual power to ratify an amendment may not be altered by the people of a state. 258 U.S. at 137. Neither *Hawke* nor *Leser* deprives the people of the right to participate in their governance by instructing their legislators and informing themselves of their legislators' performance.

Hawke and *Leser* deal with a direct attempt to supplant the legislature in the ratification process. Missouri's Article VIII does no such thing. It merely informs the Missouri congressional delegation of their constituents' wishes. It is still the Senators and Representatives who will actually propose the amendment and cast the vote. Accordingly, Missouri's Article VIII in no way alters the process established by Article V. And thus, it does not run afoul of *Hawke* and *Leser*.[30]

The Eighth Circuit's narrow interpretation of Article V and its application of *Hawke* and *Leser* do not follow from the text of the Constitution. The court of appeals stated that an

---

[30] For a more extensive discussion of why citizen instructions do not run afoul of *Hawke* and *Leser*, *see* Amar, 41 Wm. & Mary L. Rev. at 1075-83 (Professor Amar demonstrates that *Leser* actually narrows the holding in *Hawke*, and that the exigencies of the situation around the *Hawke* decision compelled the result). *Compare* Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 731 (1993) (Professor Paulsen contends that *Hawke* was simply wrongly decided).

attempt by the people to "directly influence" the amendment process violated Article V because the article "delegates the amendment process to legislative bodies, not voters."[31] *Gralike*, 191 F.3d at 924-25 (P.A. A19-22). Concededly, the text of Article V does assign the functions of amendment enactment to legislative bodies, but at no point does it protect members of these bodies from learning the will of their constituents, nor from having their constituents learn of their actions. Instead, Article V simply provides that legislative bodies will ultimately perform the amendment procedures.

Under Missouri's Article VIII, Senators and Representatives will continue to perform all the functions related to the amendment process. They will just do so with an awareness of the people's wishes. As Chief Justice (then Justice) Rehnquist recognized in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), that does not violate *Hawke*, *Leser*, or the text of Article V. The Chief Justice held that it was constitutional for the citizens of Nevada, by way of a referendum vote, to advise their legislators how to vote on the Equal Rights Amendment. 439 U.S. at 1385-88. He wrote, "I would be most disinclined to read either *Hawke*, . . . *Leser* . . . or Art. V as ruling out communication between members of the legislature and their constituents." *Id.* at 1387-88. Despite the citizen's referendum, the legislators could still vote as they saw fit; thus, the referendum was non-binding. *Id.*

---

[31] The Eighth Circuit's argument that Article V is exclusive is also unpersuasive in light of Court precedent. For example, Article V makes no provision for time limits on the ratification of amendments. So, according to the Eighth Circuit's logic of exclusivity, no such limitation is allowed. But in *Dillon v. Glass*, 256 U.S. 368, 375-76 (1921), this Court held that Congress may place a time limitation on ratification. Thus, implicitly, the Court held that Article V is not exclusive.

at 1387. *See also Miller*, 169 F.3d at 1126 and *Gralike*, 191 F.3d at 926-28 (P.A. A23-26) (Hanson, J., dissenting) (citizens can constitutionally express their opinions on prospective constitutional amendments by way of initiative petitions).

The Eighth Circuit attempted to distinguish *Kimble* from the present case by asserting that Missouri's Article VIII is "far more" than the non-binding referendum found in *Kimble*. *Gralike*, 191 F.3d at 925 (P.A. A21). This bare declaration is not a substitute for applying the principles articulated in *Kimble*. According to the Chief Justice, only those matters that change the actual process set out in Article V are of constitutional significance. That the Nevada legislature was likely to delay a vote on the amendment until after the non-binding referendum did not alter the constitutional process and was "not a constitutionally cognizable grievance." 439 U.S. at 1387. Not surprisingly, following the referendum, the Nevada legislature acted as the voters urged. But responsiveness to the people's wishes does not demonstrate a constitutional violation; it is simple democracy.

Like the referendum in *Kimble*, Missouri's Article VIII does not run afoul of Article V because it does nothing to change the Article V amendment process. It merely advises Missouri's congressional delegation of the people's wishes and the people of the candidates' behavior. To the extent that the Eighth Circuit gave any substantive basis for distinguishing *Kimble*, it was by a conclusory determination that Article VIII bound legislators to vote in favor of a constitutional amendment. *Gralike*, 191 F.3d at 925 (P.A. A21-22). In reaching this determination, the Eighth Circuit made two unsubstantiated assumptions: one, that the ballot information would operate as a handicap on candidates; and two, that

candidates would ignore their own principled opinion to avoid the supposedly coercive impact of the ballot information. Such assumptions are not just unproven,[32] they are false; and they should play no role in our constitutional jurisprudence.

The only evidence in the record as to coercion is the result of the 1996 election. But the fact that 57% of Missouri's electorate favored the term limits proposal at the 1996 election does not turn the ballot information into a penalty. The voters in subsequent years might have a different political view. In the twenty-eight counties that failed to support the amendment of Article VIII,[33] a statement on the ballot that a candidate failed to perform in accordance with the measure could be a benefit. Gralike simply offered no evidence on the effect of the ballot label.

In the absence of such evidence, the Eighth Circuit simply assumed the ballot information was a penalty. But truthful words cannot properly be considered a penalty when their supposed penal nature is entirely dependent on the changing opinions of the electorate. For example, in many locales it is reasonable to assume a particular party designation may have the "likely effect" of handicapping a candidate, but it has never been argued that it is unconstitutional to require party

---

[32] And this absence of proof is dispositive, for respondent bore the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (on a motion for summary judgment, movant bears the burden of establishing the absence of a genuine issue of material fact).

[33] *See Official Manual of the State of Missouri 1997-1998*, p. 591 (Jim Grebing ed. 1997).

candidates to run with their party designations on the ballot.[34] Neither Gralike nor the Eighth Circuit demonstrated or explained a difference of constitutional significance between compulsory party designations and the ballot information Missourians now seek to put on the ballot.

The Eighth Circuit's second assumption, unstated but implicit and necessary to find Article VIII unconstitutionally binding, is far more troublesome. No judge charged with the obligation to preserve the Constitution should assume that members of Congress are craven office-seekers who will disregard their principles and the constitutional significance of their behavior, voting only for constitutional enactments they perceive will enhance their likelihood of re-election. Instead, judges should maintain at least some modicum of respect for their co-equal branches of government.

This is especially true in this case because available evidence demonstrates the falsity of the Eighth Circuit's assumption. Representative Jo Ann Emerson from Missouri's Eighth Congressional District announced on the floor of the House that she would depart from the instructions of her constituents. Article VIII instructed Emerson to vote against any term limits proposal that permitted members of the House to serve more than six years. But she declared that she "w[ould] vote in favor of each and every serious term limits

---

[34] In rejecting an assertion that party labels mislead voters, the Court stated that "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986). Article VIII does nothing more.

proposal brought before the House," not just the one set forth in Article VIII.[35] As a result Emerson was willing to risk the placement of ballot information next to her name. Mo. Const. art. VIII, § 17, cl. 2(f). She either did not consider the ballot information a significant handicap or thought it appropriate to be led by her convictions in the significant arena of constitutional amendments.

The Eighth Circuit's assumptions were false. Article VIII is by its terms non-binding and it does not alter the process established by Article V. While it does advise the members of Congress how the people want them to vote, they "may vote for or against ratification, or refrain from voting on ratification at all, without regard to the [people's instruction]." *Kimble*, 439 U.S. at 1387. Thus, the people of Missouri did not violate Article V by instructing their Senators and Representatives and informing themselves of their actions.

C. In other contexts, the Court has found the instruction of otherwise independent legislators and delegates to be constitutional.

This Court never ruled on the constitutionality of the legislative instructions that perhaps provide the best modern analogy to those at issue here, *i.e.*, those used prior to the passage of the Seventeenth Amendment. But the Court has held that instructions are constitutional in another context: the selection of delegates to the electoral college. U.S. Const. amend. XII.

---

[35] Statement 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson).

The Constitution makes no mention at all of the people in reference to the election of the president. Nor does the Constitution state that the discretion of the electors should be inhibited in anyway.[36] Yet, the Court has indicated that this seeming independence is by no means total. *Ray v. Blair*, 343 U.S. 214 (1952). In *Ray*, the Court held that it was constitutionally appropriate for a political party to require a delegate to the electoral college to swear an oath to support the party's candidate, and to exclude anyone from being a delegate who refused to swear the oath. The Court reached this conclusion despite the fact that the Twelfth Amendment does not make any provision for inhibiting the judgment of the electors. Blair, the excluded elector, asserted that the pledge was unconstitutional, using an argument strikingly similar to that accepted by the Eighth Circuit:

> The intention of the Founders was that those electors should exercise their judgment in voting for President and Vice-President. Therefore this requirement of a pledge is a restriction in substance, if not in form, that interferes with the performance of this constitutional duty to select the proper persons to head the Nation, according to the best judgment of the elector.

Id. at 225. The Court rejected this argument, and held that it was constitutional to inhibit the judgment of electors by requiring them to pledge to support the party's candidate. *Id.* at 228-31.

---

[36] There is one exception to this unfettered discretion, but it is irrelevant to the present case. Electors, who must vote for a president and for a vice president, must cast one of those votes for someone not a resident of the elector's home state. U.S. Const. amend. XII.

Similarly, instructions under Article V should present no constitutional problem. Article V, like the Twelfth Amendment, does not specifically allow the people to instruct their officials. But as the Court implicitly recognized in *Ray*, the Constitution is not exclusive when it comes to the right of the people to instruct. In light of the history of our country, the people enjoy this right in the absence of its specific denial.[37]

II. The people of Missouri did not create a new qualification for service in Congress by merely commenting on the behavior of congressional candidates.

In striking down Missouri's Article VIII, the Eighth Circuit held that allowing the people to publicly comment on a congressional candidate's behavior violated the Qualifications Clauses. *Gralike*, 191 F.3d at 922-24 (P.A. A15-19). While the circuit court chose the right test (191 F.3d at 923; P.A. A17), it applied the test incorrectly – relying on subjective assumptions not supported by any evidence in the record.

The United States Constitution restricts who may appear

---

[37] To the extent there is any question of where the people derive such a right to advise their Senators and Representatives, it may be found in the Ninth and Tenth Amendments. *See* U.S. Const. amend. IX (the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.) and U.S. Const. amend. X (the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people). At no point in the Constitution are the people expressly deprived of the right to advise their Senators and Representatives. Thus, pursuant to the Tenth Amendment, this right is reserved to the people.

on a ballot as a candidate for the House and Senate through the Qualifications Clauses. U.S. Const., art. I, §§ 2 & 3. The restrictions found in the Qualifications Clauses are fixed and exclusive. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 798 (1995). No one suggests that Missouri has directly imposed an additional qualification on service in Congress. All Missourians over the age of twenty-five who have been citizens for more than seven years may still appear on the ballot and be elected to the House of Representatives. All Missourians over the age of thirty who have been citizens for more than nine years may still appear on the ballot and be elected to the United States Senate.

Gralike's argument and the Eighth Circuit's holding are based instead on the doctrine articulated in *Thornton,* 514 U.S. at 835-36, that states cannot indirectly impose qualifications they could not impose directly. This doctrine cannot mean that a state is barred from taking any steps that might affect the ability of a particular candidate to appear on the ballot or be elected. *Id.* at 834-35. Thus, this Court held that a state crosses the constitutional line only when its law both disqualifies a class of candidates *and* has the sole purpose of indirectly creating additional qualifications. *Id.* at 835-36, n. 48 (*citing Clements v. Fashing*, 457 U.S. 957 (1982)). *See also Gralike,* 191 F.3d at 923. (P.A. A17) (recognizing this test). Article VIII does neither.

As to the electoral injury requirement, the Eighth Circuit simply assumed that having the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appear by a candidate's name would have the "likely effect" of handicapping the candidate. Compare the dearth of evidence in the record here with the Court's discussion of the evidence in

Thornton. Arkansas would have prevented some candidate names from even appearing on the ballot – a step the evidence available to the Court clearly demonstrated was tantamount, for most candidates, to disqualification. *Thornton,* 514 U.S. at 830-31, nn. 43 & 45. In stark contrast, the Eighth Circuit neither cited nor had before it any evidence of electoral injury. And the mere fact that some voter "might," in the opinion of the Eighth Circuit, be affected by such language does not create a constitutionally impermissible handicap.[38]

As to the second part of the *Thornton* test, the people of Missouri did not solely intend to create an additional qualification for service in Congress when they passed Article VIII. Rather, Article VIII, section 15, specifically states that the people's intention is to secure an amendment to the Constitution. Despite this, the Eighth Circuit concluded that the intent of people of Missouri was to add an additional qualification for service in Congress. *Gralike*, 191 F.3d at 923-24 (P.A. A18-19).

The Eighth Circuit apparently believes Article VIII violates the Qualifications Clauses because the amendment the people seek would add a limitation on congressional service. *Id.* This argument goes too far. It would place a bar on public support for any amendment to the Qualifications Clauses,

---

[38] There are numerous items that presently appear on a ballot that might effect a voter's decisions, and the Court has never held them to be unconstitutional. For example, the placement of candidate's party affiliation on the ballot "might" effect a voter's decision. In fact, in the days of the "Solid South," the appearance of the word Republican after a candidate's name would sound the death knell for his candidacy. Despite this practical effect, no court has ever suggested that such ballot information is unconstitutional.

placing them in an exalted status above all other provisions of the Constitution. This simply cannot be. Rather, when evaluating the second element of the *Thornton* test, the Court should distinguish between the purpose of the people's action, amending the Constitution, and the purpose of their desired amendment, creating a new qualification for service in Congress. Any other reading of this element ignores the Court's careful use of the word "sole" in this portion of the test. 514 U.S. at 836.

Further, the Eighth Circuit erred by utterly ignoring the Constitution's affirmative grant of power to the states. The Constitution grants states "broad power to prescribe the 'Time, Place and Manner of holding elections for Senators and Representatives.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (*quoting Tashjian*, 479 U.S. at 217). Article VIII merely regulates the manner in which elections are held by disclosing information about congressional candidates. The Constitution contains no prohibition on this activity.[39] Hence, the Constitution's default provision, art. I, § 4, cl. 1, which "invests the States with responsibility for the mechanics of congressional elections," controls. *Foster v. Love*, 522 U.S. 67, 69 (1997).

---

[39] The Constitution does prohibit the inclusion of some information on the ballot. *See Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson*, the Court held that it was a violation of the Equal Protection Clause for the state of Louisiana to identify the race of a candidate on the ballot because, by identifying race, Louisiana was encouraging its citizens to cast their ballot on the basis of race. *Id.* at 402-04. And the Equal Protection Clause prohibits the state from doing by proxy that which it could not do by direct means, *i.e.*, exclude candidates from elective office on the basis of race. *Id.* The present case presents no analogous equal protection issue.

The Eighth Circuit's failure to recognize that Missourians possessed the right to control their ballot was in error. That failure deprived the people of their voice in government and took from the people an opportunity to control their own government.

III. The people of Missouri do not violate the First Amendment by simply commenting on the behavior of congressional candidates.

The Eighth Circuit attempted to resolve Gralike's free speech claim by treating it as if it presented a compelled speech case. This attempt to pigeonhole Article VIII is inconsistent with this Court's precedents. First, in a compelled speech case, the state law at issue must actually compel speech. No compulsion is present in Article VIII. Further, Article VIII does not attempt to regulate a congressional candidate's speech. Rather, the public informs the voters about the candidate's behavior.

Even if the Court were to conclude that a candidate's speech was indirectly affected by Article VIII, this Court's election law precedents dictate that the candidate's rights must be balanced against the interest the public seeks to promote. The Eighth Circuit utterly failed to perform any sort of balancing test. Properly balanced, the people's right to comment on the behavior of candidates for federal office outweighs a candidate's right to silence the people.

A. Article VIII does not abridge a candidate's free speech rights because it does not compel speech.

The Eighth Circuit began with the premise that the placement of ballot information adjacent to a candidate's name impermissibly compels speech. The court of appeals principally relied on *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Miami Herald Pub. Co., v. Tornillo*, 418 U.S. 241 (1974), which address the proposition that the government may not compel someone to speak. *Gralike*, 191 F.3d at 917-919 (P.A. A6-11). Concededly, the Court did find compelled speech to be unconstitutional in *Wooley* and *Tornillo*, but the cases are inapplicable to an analysis of Article VIII because it does not compel any speech. Under Article VIII, the people simply comment on the behavior of their congressional candidates. The people's communication is neither a punishment nor a penalty.[40] It is only an observation.

In *Wooley*, the issue was "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," *i.e.*, whether the vehicle's owner can be required to operate a "'mobile billboard' for the State's ideological message." 430 U.S. at 713, 715. The Court held that the message, "Live Free or Die," was speech, and that the Maynards were impermissibly compelled to publish that

[40] In its First Amendment analysis, the Eighth Circuit committed the same error that was prevalent throughout its opinion. The court assumed that the ballot information would be some sort of punishment, and it conceded the assumption by describing the punishment not as "actual," but merely as "potential political damage." *Gralike*, 191 F.3d at 918 (P.A. A9). Because the record contains no evidence on this point, it is unclear what effect the ballot information would have on any election.

message.[41]

The Court in *Wooley* relied on two prior cases in which someone was required to deliver a message against their will: *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The Court held that requiring the Maynards to bear the state's message on their license plate was speech by the Maynards, compelled in the same fashion as the speech in *Tornillo* (where the Court "held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized") and *Barnette* (where the Court was "faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures"). 430 U.S. at 714. The Eighth Circuit also cited two post-*Wooley* cases, but both fit the *Wooley* model. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 786 (1988), the Court considered a requirement that professional fund raisers disclose certain information "prior to any appeal for funds." And in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1, 4 (1986), the state "require[d] a privately owned utility to include in its billing envelopes speech of a third party with which the utility disagrees."

In each of these cases, the state was dictating the

[41] The dissent in *Wooley* questioned that conclusion: "The State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture." 430 U.S. at 720 (Rehnquist, J. dissenting).

message, then requiring the plaintiffs to deliver it.[42] That is not true here. The message here is the people's, and they have directed the Secretary of State to disseminate it. Though the message will be adjacent to the name of a candidate, nothing in its placement or content suggests that the message is the candidate's own. To the contrary, the law itself and the required phrasing of the public's message indicate that it has an origin other than the candidate. Thus, *Wooley* and the other "compelled speech" cases relied upon by the Eighth Circuit are inapposite.

B. Article VIII does not abridge a candidate's free speech rights because the candidate remains free to speak or remain silent; the people simply comment on the candidate's behavior.

In amending their constitution, the people of Missouri require the Secretary of State to monitor the actions of congressional candidates and report, in shorthand form, on those actions. Thus, the people place ballot information next to the name of an incumbent candidate who fails to engage in any one of eight specified behaviors. Mo. Const. art. VIII, § 17(2). The people do not compel the performance of any of the eight behaviors. They just insist on knowing whether they were actually performed.

Surely it does not present a constitutional problem to

---

[42] For example, in *Wooley*, the state compelled the speech by using the threat of criminal punishment. 430 U.S. at 707-08. And in *Tornillo*, the state compelled the speech using the threat of civil penalty. 418 U.S. at 244.

comment on someone's actions. This is all the people do under Article VIII. The focus is completely upon the behavior of congressional candidates. If an incumbent candidate delivers speech after speech against term limits on the floor of the house, she will not receive the ballot notation if she acts as the people wish.[43] If an incumbent candidate denigrates term limits in advertisements, she will not receive the ballot notation if she acted as the people wish. In fact, if the incumbent candidate goes so far as to actually lobby her congressional colleagues to vote against Missouri's proposed term limits amendment, she still will not receive the ballot notation if she acted as the people wish. Thus, Article VIII only provides for a comment on behavior, not on speech. And this Court has never held a simple comment on the behavior of another to be a violation of the Constitution.

The situation is much the same for non-incumbent candidates. Pursuant to Article VIII, § 18, non-incumbent candidates are provided an opportunity to take a pledge, with any failure to take the pledge noted on the ballot. The focus of the public's message is, once again, on whether the candidate takes the pledge, not what a candidate may say about term limits. The non-incumbent is free to decry the concept of term

---

[43] Accordingly, Senators and Representatives will have ample opportunity to disassociate themselves from their actions. Because of the opportunity for disassociation, any possible burden Article VIII places on their free speech rights is, at best, slight. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (because shopping center owner had an opportunity to disassociate himself from pamphleteers' speech, his First Amendment rights were not violated when the State of California forced him to allow pamphleteers to use his property); *see also Wooley*, 430 U.S. at 722 (Rehnquest, J., dissenting) (because plaintiff had an opportunity to disassociate himself from the New Hampshire state motto, New Hampshire was not guilty of unconstitutionally compelling speech).

limits and the pledge itself; the people simply need to know whether the candidate took the pledge. The candidate remains free to speak or keep silent as he chooses; the people of Missouri simply need to be informed about the candidate's behavior.

To the extent that the people's message regarding the candidate's behavior is considered a comment on silence, this Court has repeatedly held that it is appropriate to comment on another's silence, and even draw an inference from another's silence in a non-criminal context. *See e.g., Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 286-87 (1998); *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976). Insofar as Article VIII, § 18 applies to non-incumbents, that is all that occurs. The people comment on the candidate's failure to take a pledge to support a term limits amendment. Mo. Const. art. VIII, § 18. They do not require the candidate to take the pledge; they simply observe that the candidate did not take the pledge.[44] This is constitutionally sound.

By its opinion, the Eighth Circuit used the Free Speech Clause to silence the public's speech and frustrated the purposes of the First Amendment. It transformed congressional candidates from a group of individuals subject to public commentary into a cloistered oligarchy in which the exalted elected officials may behave as they see fit, but the simple people may make no comment. Thus, the court of appeals opinion undercuts the very essence of the First Amendment:

---

[44] The court of appeals suggested that it was Missouri's Secretary of State who was making the observation. *Gralike*, 191 F.3d at 920 (P.A. A12). Though this may be technically correct, it is misleading. As discussed more fully in section IV, the people have told the Secretary when she must place the information on the ballot; she is afforded no discretion.

the right of the people to discuss their own government. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Constitution protects the right to receive information and ideas); *see also Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966) (the major purpose of the First Amendment was to protect the free discussion "of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."). This Court should restore to the people their First Amendment freedoms.

C. Even if Article VIII has a slight impact on candidate speech, that impact cannot outweigh the overwhelming interest of Missourians in communicating with and receiving information about their public officials.

The Eighth Circuit failed to recognize that even in "compelled speech" cases, the requirement that a plaintiff express government-mandated words is not automatically unconstitutional; it is subject to a balancing test. *See Wooley*, 430 U.S. at 716 ("We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates."). Further, this Court made clear in *Timmons* what had long been true: that there is no one test for determining whether an election law affecting speech violates the First Amendment. 520 U.S. at 358-59 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). *See also, Nixon v. Shrink Missouri Government PAC*, ____U.S.___, 120 S.Ct. 897, 903 (2000) (declining to apply a label that encompasses "[p]recision about the relative rigor of

the standard" to be applied). But one thing is clear: the essence of the analysis is the balancing of the burden the election law places on the plaintiff's rights against the nature of the government's interests. *Timmons*, 520 U.S. at 358-59.

Here, the Eighth Circuit committed the same error it committed in *Timmons* itself: it simply chose a label (here, "compelled speech"), invoked another label (here, "strict scrutiny"), and then jumped to the conclusion that "strict scrutiny" is "scrutiny that is strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring). For example, in footnote 8 of its opinion, the court of appeals claimed that under *Burdick* strict scrutiny would apply because Article VIII is a content-based and viewpoint-based speech restriction. *Gralike*, 191 F.3d at 920, n. 8 (P.A. A12). But the Eighth Circuit failed to recognize that even in *Burdick*, this Court demanded balancing: it held that a court, when determining the constitutionality of an election law, should look to the "character and magnitude" of the restriction on speech and not its classification. 504 U.S. at 434 (citation omitted). And, as the Court has indicated more recently, "where constitutionally protected interests lie on both sides of the legal equation . . . there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *Nixon*, 120 S.Ct. at 911 (Breyer, J., concurring). The "content-based" and "viewpoint-based" labels, in the sense used by the Eighth Circuit, would apply in essentially all of the election-speech cases. But none of these cases suggest that labeling substitutes for analysis or permits a court to avoid the balancing requirement.[45]

[45] Not only did the Eighth Circuit fail to balance the competing interests at issue, it decided this case as if the plaintiffs bore no burden to show that their freedom of speech was even being infringed. But this Court has noted that, "[a]lthough it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Article VIII, if it places any burden at all, places only a slight burden on the free speech rights of candidates for Congress. Candidates can decry the evils of term limits in speech after speech without incurring any comment from the people of Missouri. Contrarily, candidates can campaign without uttering a word about term limits and the people would not place ballot information next to their names. The only two things that would cause the people to place ballot information next to a candidate's name are: the incumbent candidate's behavior in Congress and the non-incumbent candidate's behavior in failing to sign the pledge. Thus, the people comment on only the narrowest range of activities, and the magnitude of any possible restriction on speech created by Article VIII is, at most, small.

Further, a congressional candidate's opportunity to disassociate herself from these actions further decreases the magnitude of any impermissible limitation on speech. While the candidate performs the activities in Article VIII, she is free to explain that she is only acting as the people requested, or that she actually believes term limits to be an abysmal idea. In fact, the candidate may decry term limits loudly and longly. Because of this opportunity for disassociation, the magnitude of any possible burden on candidates' free speech rights is further diminished. *See PruneYard*, 447 U.S. at 87; *Wooley*, 430 U.S. at 722 (Rehnquest, J., dissenting).

On the other side of the balance, the people have a

strong interest in preserving Article VIII. Initially, their interest may be found in the Constitution itself. Article I, § 4 of the Constitution grants to the states the power to prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives."[46] In passing Article VIII, the people were only regulating the manner in which elections would be held by deciding what information would appear on the ballot. Thus, they were acting in accordance with their constitutional mandate.

Further, the people have a fundamental interest in preserving their voice in government. By passing Article VIII, the people of Missouri announced to the world that they wanted the Constitution amended. They spoke as one, as the body politic itself, and not as a collection of diffuse individuals. This voice of the people must be heard to ensure the integrity of our government because "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *Thornton*, 514 U.S. at 843 (Kennedy, J., concurring) *quoting Hague v. Committee for Industrial Organization*, 307 U.S. 496, 513 (1939) (opinion of Roberts, J., joined by Black, J., and joined in relevant part by Hughes, C.J.). For a government is only valid if it responds to the will of the people. By passing Article VIII, the people simply voiced their will. And preserving the people's voice in government is not only an important interest;

---

[46] Concededly, Article I, § 4 allows only the legislature to prescribe the time, place, and manner of election and not the people. But in the area of election laws, the Court has rejected any distinction between the state's legislature and the state's populace. *See Davis v. Hildebrandt*, 241 U.S. 565, 568 (1916) (the people of the states, by use of referendum, may regulate the time, place and manner of holding congressional elections).

it is a paramount interest. Nothing in the Constitution compels the federal courts to deprive Missouri's electorate of their free speech rights.

Additionally, the people have the right to provide (*i.e.*, speak) and the right to receive information. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Tashjian*, 479 U.S. at 220. In fact, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). *See also Tashjian*, 479 U.S. at 220 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."), *quoting Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983); *Stanley*, 394 U.S. at 564 (Constitution protects rights to receive information and ideas); *Mills*, 384 U.S. at 218-19 (the major purpose of the First Amendment was to protect the free discussion "of governmental affairs, which includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes").

The right to receive information and the other closely related concerns identified above are critically related to the people's involvement in government. Such involvement is an essential element of democracy. In this day of public disengagement from the electoral process, measures enacted at the behest of the people through the initiative process present a great opportunity to once again engage the public in the

business of government by empowering the people to articulate what is critically important to them. Additionally, giving the public the means to evaluate the respect politicians accord their determination encourages further public participation in the process and combats the detachment prevalent in our political process. Thus, Article VIII not only furthers an interest in an informed electorate, it presents a very real opportunity to reestablish the vital link between the governed and their representatives – to engage on a broad scale in the "[d]iscussion of public issues and debate on the qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. No interest could be more compelling. Therefore, the people's interest in passing Article VIII outweighs any possible effect Article VIII may have on the free speech rights of candidates for Congress.

D. Article VIII is narrowly tailored to advance the people's compelling interests.

The Eighth Circuit concluded that Article VIII is not "narrowly tailored to achieve even the more limited goal of informing voters of candidates' views on term limits." *Gralike*, 191 F.3d at 921 (P.A. A14). That statement relies on an incorrect factual premise: Missourians did not have the generalized goal of informing voters of candidates' views on term limits – Missourians want to know how their congressional candidates behaved in regard to a particular proposed constitutional amendment, not what they generally think about term limits. But the Eighth Circuit's statement also embodies a legal error. Similar to the labeling "analysis" criticized above, the circuit court speaks of "narrow tailoring" as if it were a precise test that could be measured with a tailor's

tape. In fact, the extent to which a particular regulation must be "tailored" to advance government interests depends on the balancing test described above.

In light of the interests discussed above, Article VIII is narrowly tailored; it does nothing more than is necessary to effectively and efficiently achieve its compelling goals. Article VIII provides the public with the information they requested and it utilizes the public's voice to communicate that information, thereby engaging the public in their government. The people wanted Congress to pass a particular Constitutional amendment regarding term limits and they told congressional candidates precisely what they wanted the amendment to be. The electorate wanted to know which congressional candidates either declined to pledge to behave so as to advance this particular measure or failed to act in certain specified ways to bring about its enactment. This is precisely what the electorate is to be told.[47] No more, no less. And the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Article VIII advances these interests and it does so with precision.

---

[47] The Eighth Circuit criticizes Article VIII because it only provides information on those candidates whose behavior fails to demonstrate support of the public's desired outcome. *Gralike*, 191 F.3d at 918 (P.A. A9). Nothing could be more narrowly tailored. Missourians do not wish to reward political candidates for following the people's instructions; such could be viewed as an inappropriate public endorsement on the basis of only one issue. Rather, the people simply need understandable information about the behavior of candidates not favorably disposed to their desired outcome so that they can evaluate this behavior in light of other information they have about such candidates.

Public disillusionment with a government that is perceived by many to be unresponsive to the will of the governed is an epidemic that literally threatens our participatory democracy. Article VIII provides an answer, allowing the people to speak with a clear voice and further permitting them to perform a ready evaluation of otherwise indiscernible candidate behavior. Thus, Article VIII serves the compelling interest of combating voter disillusionment and is narrowly tailored to truly allow the voters to accomplish that objective. Measures like Article VIII could reinvigorate American democracy by once again empowering the electorate and thereby engaging the public in our democratic process. There can be no higher public interest.

IV. The Speech and Debate Clause does not insulate public officials from the will of their constituents.

In its opinion, the Eighth Circuit held that the people violate the Speech and Debate Clause of the Constitution[48] when they comment on the actions of their own elected officials. *Gralike*, 191 F.3d at 921-922 (P.A. A14-15). That holding breaks new ground, carrying the Speech and Debate Clause so far beyond its historical and logical bounds that it interferes with representative democracy.

Contrary to the Eighth Circuit's view, the Speech and Debate Clause is merely a "legislative privilege, protecting against possible prosecution by an unfriendly executive and

---

[48] The provision provides that Senators and Representatives "shall not be questioned in any other place" for "any Speech or Debate in either House." U.S. Const. art. I, § 6.

conviction by a hostile judiciary." *U.S. v. Johnson*, 383 U.S. 169, 179 (1966). Thus, the clause serves to ensure the independence of the legislature by preventing executive and judicial intrusion into the legislative process. The Court reaffirmed this principle in *Gravel v. United States*, noting that the fundamental purpose of the Clause was to free "the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." 408 U.S. 606, 618 (1972).

The privilege created by the Speech and Debate Clause was not intended to foreclose comment by the voters on the legislative process. Nor was the Clause ever intended to shield legislators from the electoral judgment of the governed. Indeed, quite contrary to the Eighth Circuit's holding, the system of electoral representation established by our Constitution forces "Senators and Representatives to speak and vote" while facing the threat of electoral "retribution." *See Gralike*, 191 F.3d at 922 (P.A. A15). Allowing the people to provide and receive information about their legislators' performance may enhance the possibility of retribution, but not in any way that the Speech and Debate Clause prohibits.

The Eighth Circuit implicitly conceded the absence of precedential or historical support for its holding by selectively quoting words from *Gravel* to give the holding a wholly new meaning. The court of appeals claimed that this Court wrote, "'[T]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats . . . that directly impinge upon or threaten the legislative process.'" *Gralike*, 191 F.3d at 922 (P.A. A15), *quoting Gravel*, 408 U.S. at 616. Though this citation seems to support the Eighth

Circuit's conclusion, the complete quotation does not. *Gravel* actually states, "[T]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats *from the Executive Branch*. It thus protects Members *against prosecutions* that directly impinge upon or threaten the legislative process." *Id.* at 616 (emphasis added).[49] The complete quotation reinforces the idea that the Speech and Debate Clause was designed to protect the members of Congress from the coordinate branches of government and not from their own constituents. *See also, U.S. v. Helstoski*, 442 U.S. 477, 488 (1979) ("the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts").

The information placed on the ballot by Missourians pursuant to the terms of Article VIII is not the constitutional equivalent of a prohibited criminal or civil prosecution or feared executive action.[50] It is, rather, protected public commentary on

[49] The underline indicates the portion of this Court's language the Eighth Circuit omitted from its rendition of this Court's holding. *Gralike*, 191 F.3d at 922 (P.A. A15).

[50] While the Eighth Circuit was correct in noting that Article VIII did involve some executive action, the executive action is merely ministerial. The Secretary of State physically places the information on the ballot. But there can be no serious dispute that it is the people who have directed that it be done and that the Secretary must follow specific instructions when placing the information on the ballot. She places ballot information next to an incumbent candidate's name if, and only if, the candidate meets one of the criteria specifically outlined in Article VIII, § 17(2)(a-g); and next to a non-incumbent candidate's name if, and only if, the candidate refuses to take the pledge set forth in Article VIII, § 18. The Secretary has no discretion in either case. *See also In re Matter of Impeachment of Moriarty*, 902 S.W.2d 273, 277 (Mo. 1994) (the vast majority of the duties assumed by the Missouri Secretary of State are ministerial, especially in the area of elections).

the behavior of congressional candidates. And the Speech and Debate Clause was never intended to insulate politicians from political consequences imposed by their constituents.

CONCLUSION

Petitioner respectfully requests this Court to reverse judgment of the United States Court of Appeals for the Eighth Circuit and to render judgment for Petitioner.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor

JAMES R. McADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

* *Counsel of Record*

June 22, 2000

Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,
Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

JONATHAN S. FRANKLIN
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5766

ARTHUR A. BENSON II*
GREGG LOMBARDI
ARTHUR BENSON & ASSOCIATES
4006 Central Avenue
P.O. Box 119007
Kansas City, Missouri 64171
(816) 531-6565

*Counsel of Record

Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Constitution permits a state government to place pejorative and misleading ballot labels next to the names of candidates for Congress who do not follow, or do not pledge to follow, the government's instructions to vote for a federal constitutional amendment once favored by a majority of statewide initiative voters.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
1. Enactment of the Label Law	2
2. Invalidation of the Label Law	5
3. Label Laws in Other States	6
4. The Label Law's Effect on Elections	7
5. The Label Law's Effect on Members of Congress	8
SUMMARY OF ARGUMENT	11
ARGUMENT	12
I. THE LABEL LAW EXCEEDS THE STATE'S CONSTITUTIONAL AUTHORITY	12
A. The Label Law Exceeds the State's Power Under the Elections and Qualifications Clauses	12
B. The History of the Constitution Shows that the States Have No Delegated Power to Coerce Federal Legislators Through Enforceable Instructions	21
1. The Rejection of a "Right to Instruct"	22

TABLE OF CONTENTS—Continued

	Page
2. Pre-Constitutional History Does Not Support the Validity of the Label Law	27
3. Post-Constitutional History Does Not Support the Validity of the Label Law	30
4. The Label Law Violates Principles of Federalism	32
II. THE LABEL LAW VIOLATES THE FIRST AMENDMENT	34
A. The Label Law is Subject to Strict Scrutiny	34
B. The Label Law Cannot Withstand Strict Scrutiny	39
III. THE LABEL LAW VIOLATES THE SPEECH OR DEBATE CLAUSE	43
IV. THE LABEL LAW CONTRAVENES ARTICLE V	47
CONCLUSION	50

TABLE OF AUTHORITIES

	Page
Cases:	
Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977)	37
Advisory Opinion to the Attorney General Re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998)	18
AFL-CIO v. *Eu*, 686 P.2d 609 (Cal. 1984)	49
Anderson v. *Celebrezze*, 460 U.S. 780 (1983)	37, 40
Anderson v. *Martin*, 375 U.S. 399 (1964)	15, 37
Baker v. *Carr*, 369 U.S. 186 (1962)	6
Barker v. *Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998)	7
Bond v. *Floyd*, 385 U.S. 116 (1966)	35
Boos v. *Barry*, 485 U.S. 312 (1988)	43
Bowsher v. *Synar*, 478 U.S. 714 (1986)	22
Bramberg v. *Jones*, 978 P.2d 1240 (Cal. 1999)	7
Brown v. *Hartlage*, 456 U.S. 45 (1982)	39
Brown & Williamson Tobacco Corp. v. *Williams*, 62 F.3d 408 (D.C. Cir. 1995)	44
Buckley v. *Valeo*, 424 U.S. 1 (1976)	35, 39
Burdick v. *Takushi*, 504 U.S. 428 (1992)	6, 37
Burson v. *Freeman*, 504 U.S. 191 (1992)	38, 43
California Democratic Party v. *Jones*, 120 S. Ct. 2402 (2000)	12, 42
Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980)	16
Chandler v. *Miller*, 520 U.S. 305 (1997)	5
Citizens Against Rent Control v. *City of Berkeley*, 454 U.S. 290 (1981)	39
Clarke v. *United States*, 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc)	35

TABLE OF AUTHORITIES—Continued

	Page
Consolidated Edison Co. v. *Public Service Commission of New York.*, 447 U.S. 530 (1980)	38
Dandridge v. *Williams*, 397 U.S. 471 (1970)	13
Dillon v. *Gloss*, 256 U.S. 368 (1921)	49
Dodge v. *Woolsey*, 59 U.S. 331 (1855)	48
Donovan v. *Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997)	7, 50
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975)	45, 46
Foster v. *Love*, 522 U.S. 67 (1997)	13
Georges v. *Carney*, 691 F.2d 297 (7th Cir. 1982)	40
Gravel v. *United States*, 408 U.S. 606 (1972)	43, 44, 46
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	41
Harper & Row Publishers, Inc. v. *Nation Enterprises*, 471 U.S. 539 (1985)	35
Hawke v. *Smith*, 253 U.S. 221 (1920)	47, 48, 50
Hollingsworth v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798)	47
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935)	49
Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)	42
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)	44
In re Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996)	7
In re Opinion of the Justices, 148 So. 107 (Ala. 1933)	32
Immigration & Naturalization Service v. *Chadha*, 462 U.S. 919 (1983)	25
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951)	6

TABLE OF AUTHORITIES—Continued

	Page
Kilbourn v. *Thompson*, 103 U.S. 168 (1880)	43
Kimble v. *Swackhamer*, 439 U.S. 1385 (1978)	49
League of Women Voters v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997)	7, 19
Lehnert v. *Ferris Faculty Association*, 500 U.S. 507 (1991)	35
Leser v. *Garnett*, 258 U.S. 130 (1922)	48
McIntyre v. *Ohio Elections Commission*, 514 U.S. 334 (1995)	32, 37, 38, 40
Meyer v. *Grant*, 486 U.S. 414 (1988)	39
Miller v. *Moore*, 169 F.3d 1119 (8th Cir. 1999)	6, 7, 17, 26
Mills v. *Alabama*, 384 U.S. 214 (1966)	39
Monitor Patriot Co. v. *Roy*, 401 U.S. 265 (1971)	39
Moore v. *Ogilvie*, 394 U.S. 814 (1969)	5
Morrissey v. *State*, 951 P.2d 911 (Colo. 1998)	7
National Association for the Advancement of Colored People v. *Button*, 371 U.S. 415 (1963)	41
Newberry v. *United States*, 256 U.S. 232 (1921)	13, 16
New York v. *United States*, 505 U.S. 144 (1992)	33
Ohio ex rel. Davis v. *Hildebrandt*, 241 U.S. 565 (1916)	12
Opinion of the Justices, 160 N.E. 439 (Mass. 1928)	48
Opinion of the Justices, 673 A.2d 693 (Me. 1996)	7, 33
Pacific Gas & Electric Co. v. *Public Utilities Commission*, 475 U.S. 1 (1986)	35, 36
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972)	36
Printz v. *United States*, 521 U.S. 898 (1997)	32, 33

TABLE OF AUTHORITIES—Continued

	Page
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992)	38, 43
Ray v. *Blair*, 343 U.S. 214 (1952)	19, 20
Riley v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988)	16, 40, 43
Rosario v. *Rockefeller*, 410 U.S. 752 (1973)	5
Rosenberger v. *Rector & Visitors*, 515 U.S. 819 (1995)	38
Simon & Schuster, Inc. v. *Members of New York State Crime Victims Board*, 502 U.S. 105 (1991)	38
Simpson v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997)	7
Smiley v. *Holm*, 285 U.S. 355 (1932)	13
Spallone v. *United States*, 493 U.S. 265 (1990)	35, 46
State ex rel. McCue v. *Blaisdell*, 118 N.W. 141 (N.D. 1908)	32
State v. *Waltermire*, 691 P.2d 826 (Mont. 1984)	49
Stella v. *Kelley*, 63 F.3d 71 (1st Cir. 1995)	35
Storer v. *Brown*, 415 U.S. 724 (1974)	5, 37
Supreme Court of Virginia v. *Consumers Union of the United States*, 446 U.S. 719 (1980)	46
Tashjian v. *Republican Party*, 479 U.S. 208 (1986)	37
Tenney v. *Brandhove*, 341 U.S. 367 (1951)	47
Thornhill v. *Alabama*, 310 U.S. 88 (1940)	37
Timmons v. *Twin Cities Area New Party*, 520 U.S. 351 (1997)	19, 40
Turner Broadcasting System, Inc. v. *Federal Communications Commission*, 512 U.S. 622 (1994)	38
United States v. *Brewster*, 408 U.S. 501 (1972)	46
United States v. *Classic*, 313 U.S. 299 (1941)	13
United States v. *Johnson*, 383 U.S. 169 (1966)	45

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000)	38, 39
United States v. *Sprague*, 282 U.S. 716 (1931)	48
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990)	48
U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995)	*passim*
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989)	13
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943)	35
Whitney v. *California*, 274 U.S. 357 (1927)	39
Wooley v. *Maynard*, 430 U.S. 705 (1977)	36

Constitutional Provisions:

Elections Clause, U.S. Const. art. I, § 4, cl. 1	12
Qualifications Clauses, U.S. Const. art. I, § 2, cl. 2, § 3, cl. 3	20
Republican Guaranty Clause, U.S. Const. art. IV, § 4, cl. 1	25
Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1	43
U.S. Const. amend. I	34
U.S. Const. art. I, § 1	25
U.S. Const. art. I, § 2, cl. 1	48
U.S. Const. art. I, § 4, cl. 2	25
U.S. Const. art. II, § 1	20
U.S. Const. art. V	47
Mo. Const. art. VIII, § 15	1, 3, 17, 21
Mo. Const. art. VIII, § 16	3
Mo. Const. art. VIII, § 17	1, 44
Mo. Const. art. VIII, § 17(1)	3
Mo. Const. art. VIII, § 17(2)	3, 4, 9, 44
Mo. Const. art. VIII, § 17(3)	3

TABLE OF AUTHORITIES—Continued

	Page
Mo. Const. art. VIII, § 18	3
Mo. Const. art. VIII, § 18(1)	4
Mo. Const. art. VIII, § 18(3)	4, 6
Mo. Const. art. VIII, § 19(1)	4
Mo. Const. art. VIII, § 19(2)	4-5
Mo. Const. art. VIII, § 19(5)	5
Mo. Const. art. VIII, § 19(6)	5

Statutory Provisions

Cal. Elec. Code § 13307	43
Mo. Rev. Stat. § 115.637(18)	42
N.J. Stat. Ann. § 19:44A-37	43
1 W. & M. Sess. 2, ch. 2 (1689)	45

Legislative and Executive Materials

Alaska Op. Att'y Gen. No. 2 (1998)	7
1 Annals of Congress 761-767 (Joseph Gales ed., 1789)	2, 22-25, 26
30 Annals of Congress 577 (1817)	31
Cong. Globe, 35th Cong., Spec. Sess. of the Senate 805 (1858)	28
141 Cong. Rec. 9748 (1995)	10
143 Cong. Rec. H418-H419 (Feb. 11, 1997)	11, 19
143 Cong. Rec. H458-H512 (Feb. 12, 1997)	*passim*
143 Cong. Rec. E277 (Feb. 13, 1997)	4, 10
Nevada Att'y Gen. Op. No. 2000-11	7
Senate Journal (Sept. 3, 1789)	22

Other Authorities:

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991)	25, 26
Vik D. Amar, *The Senate and the Constitution*, 97 Yale L.J. 1111 (1988)	31

TABLE OF AUTHORITIES—Continued

Page

Articles of Confederation, art. V 34
Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 Cornell L. Rev. 109 (1996)..... 16
Thomas E. Cronin, Direct Democracy (1989) 26, 28, 29, 30
David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable (1995)..... 26, 30
The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 2d ed. 1836) 29, 30
William E. Dodd, *The Principle of Instructing United States Senators*, 1 S. Atlantic Q. 326 (1902) 31
Maura Dolan, *Initiative on Term-Limits Loyalty Voided*, L.A. Times, July 9, 1999 ..... 7, 8
Bob Egelko, *Candidates Face Ballot Labeling Over Term Limits*, San Diego Union-Trib., Aug. 23, 1998..... 8
Bob Egelko, *Term-Limits Initiative Struck Down*, Orange County Register, July 9, 1999.... 8
The Federalist Papers (Clinton Rossiter ed., 1961) 16, 23, 30, 49
The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds., 1987)..... 29
Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533 (1999) 8, 16, 19
Journal of William Maclay (Edgar S. Maclay ed., 1890)..... 31
Russell Kirk, The Conservative Constitution (1990) 29

TABLE OF AUTHORITIES—Continued

Page

Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567 (1996) 26, 30
The Records of the Federal Convention of 1787 (Max Farrand ed., 1966)..... 23, 45
Robert J. Reinstein & Harvey L. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973) 45
Robert Salladay, *Hot Battle for East Bay Senate Seat*, San Fran. Examiner, Aug. 27, 1998, at A5 8
Joseph Story, Commentaries on the Constitution of the United States (1833) 16, 34, 50
Cass R. Sunstein, Democracy and the Problem of Free Speech (1993) 26
Roy Swanstrom, *The United States Senate 1787-1801*, S. Doc. No. 87-64 (1961)..... 30, 31
Thaai Walker, *Perata Wins Assembly, Senate Seats*, San Fran. Chron., Nov. 4, 1998 8
Noah Webster, *Government*, The American Magazine 204 (Mar. 1788)..... 26
Webster's Third New International Dictionary (1986) 17, 18
George F. Will, *Save Us From the Purists*, Newsweek, Feb. 17, 1997 26
Carl Wittke, The History of English Parliamentary Privilege (1970)..... 45
The Works of James Wilson (Robert Green McCloskey ed. 1967) 46
The Works of John Adams (Charles F. Adams ed., 1969)..... 29

IN THE

Supreme Court of the United States

No. 99-929

REBECCA MCDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

Through the law challenged in this case (the "Label Law"), the State of Missouri has attempted to skew the outcome of federal elections and federal legislative debate by handicapping candidates who disagree with the government's preferred position on a single issue. The Law "instructs" federal representatives to use "all of [their] delegated powers to pass" a proposed federal constitutional amendment addressing term limits. Mo. Const. art. VIII, § 17. If candidates do not pledge to follow this legal command, or if elected representatives do not, in the view of the Missouri Secretary of State, follow the command, the government will place a negative label—either "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS"—next to their names on the ballot when they run for federal office. The sole expressed intent of the Label Law is to cause the adoption of the proposed amendment. *Id.* § 15.

As shown below, the Label Law contravenes at least five provisions of the federal Constitution. The reasons for each of those violations, however, are much the same: the Constitution prevents the State from using its control over the ballot to skew political debate and handicap federal candidates who do not support the government's preferred position on a single issue. This case is not, as petitioner (the "State") suggests, about the right of the "people" to express their views. Each person in Missouri has the unquestioned right to inform candidates and legislators of his or her views, and to vote accordingly. But the state government may not place its thumb on the electoral scale in an attempt to interfere with the freedom of federal candidates to decide for themselves on which issues they will campaign, and how they will vote if elected.

Shortly after the framing of the Constitution, during the debates in Congress on what would become the Bill of Rights, James Madison made clear that enforceable instructions issued by States to federal representatives were incompatible with the new constitutional system. As he stated, permitting such instructions "obliges us to run the risk of losing the whole system." 1 Annals of Congress 767 (Joseph Gales ed., 1789). If upheld, the Label Law will have precisely that feared result. It will undoubtedly spawn other efforts by state governments to use the ballot to bully federal candidates and representatives who hold disfavored views on other issues, and will transform the ballot from a neutral vehicle for the expression of voter preferences into a mechanism for state coercion of campaign and legislative debate.

STATEMENT OF THE CASE

1. Enactment of the Label Law. In *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), this Court held that the Constitution does not permit a State to impose term limits on Members of Congress. The Court accordingly advised that, if such term limits are to be enacted, they "must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the

electoral process—through the amendment procedures set forth in Article V." *Id.* at 837 (footnote omitted).

Nevertheless, following *Thornton* term limits proponents attempted once again to achieve their objective through state legislation. In November 1996, those proponents succeeded in enacting the Label Law through voter initiative. That law, enacted as an amendment to the Missouri Constitution, has three basic components. *First*, the Law states that it is the intention of the "people of Missouri" that the Label Law "lead to the adoption of" a proposed term limits amendment to the United States Constitution. Mo. Const. art. VIII, § 15. The Law sets forth the text of that proposed amendment, which would limit Senators to two terms and Representatives to three terms, although States could alter those limits by amending their own constitutions. *Id.* § 16.

Second, the Label Law expressly "instructs" each Senator and Representative elected from Missouri "to use all of his or her delegated powers to pass the Congressional Term Limits Amendment," *id.* § 17(1), and asks non-incumbent candidates to "pledge" to do the same if elected, *id.* § 18. The instruction is enforced when the person next runs for office. A Member of Congress who fails to comply with any one of a long list of directives shall have the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed on every primary and general election ballot next to his or her name. *Id.* § 17(2) (captitalization in original). This labeling provision remains in effect until Congress passes the proposed amendment. *Id.* § 17(3).

Under the Label Law, a Senator or Representative is labeled if he or she (1) "fails to vote in favor" of the proposed amendment; (2) "fails to second the proposed [amendment] if it lacks for a second"; (3) "fails to propose or otherwise bring to a vote of the full legislative body the proposed [amendment]" if it lacks such a sponsor; (4) "fails to vote in favor of all votes bringing the proposed [amendment] before any committee or subcommittee"; (5) "fails to reject any attempt

to delay, table, or otherwise prevent a vote by the full legislative body of the proposed [amendment]"; (6) "fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed [amendment] regardless of any other actions in support of the proposed [amendment]"; (7) "sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed [amendment]"; or (8) fails to ensure that all votes on the proposed amendment are made public. *Id.* § 17(2)(a)-(h).

The Label Law also affords non-incumbent candidates for Congress the "opportunity" to take a term limits "pledge." *Id.* § 18(1). Candidates who do not take the pledge shall have the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed beside their names on every primary and general election ballot. *Id.* (capitalization in original). To avoid the label, a non-incumbent must pledge as follows:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name. [*Id.* § 18(3).]

Because of these labeling provisions, the Label Law has often been referred to as the "Scarlet Letter" law—including by the Missouri Secretary of State's office and Members of Congress from Missouri. *See, e.g.*, J.A. 34; 143 Cong. Rec. H494 (daily ed. Feb. 12, 1997) (statement of Rep. Blunt); *id.* at E277 (Feb. 13, 1997) (statement of Rep. Emerson).

Third, the Label Law makes Missouri's Secretary of State—an elected, political official—responsible for determining whether a candidate shall receive either of the labels. Mo. Const. art. VIII, § 19(1). In making that determination, the Secretary is required to consider public comments. *Id.*

§ 19(2). The process, however, is biased in favor of labeling. If the Secretary decides that a particular candidate is not to be labeled, any "elector" (voter) may appeal that decision to the Missouri Supreme Court, and in such actions, the burden is on the Secretary "to demonstrate by clear and convincing evidence that the candidate * * * should not" be labeled. *Id.* § 19(5). But if the Secretary decides that a candidate is to be labeled, the candidate may appeal, and the burden is on the candidate to show under the clear and convincing standard that the label should not be applied. *Id.* § 19(6).

2. Invalidation of the Label Law. Respondent Donald J. Gralike, a Democratic candidate for the House of Representatives from Missouri during the 1998 election, filed suit against petitioner, Missouri's Secretary of State, seeking to enjoin enforcement of the Label Law. He made clear that his political beliefs prevented him from taking the term limits pledge, and he challenged the constitutionality of the Label Law, including the pledge, the instructions and label incorporated within the pledge, and the label that would be imposed on him for not taking the pledge. *See* J.A. 3-14.[1]

The District Court granted summary judgment in Gralike's favor, holding that the Label Law violated four separate constitutional provisions: the Qualifications and Elections Clauses, Article V, and the First Amendment. Pet. App. A27-A35, A40-52, A58-A62. The Eighth Circuit affirmed,

---

[1] While the case was on appeal, Gralike withdrew from the 1998 election, and respondent Mike Harman, another congressional candidate, intervened as an appellee. Harman was also a candidate in the 2000 Republican congressional primary, and both respondents intend to run again in the future. But regardless of respondents' current status or plans, this case is not moot because it is well settled that election law challenges such as this one are "capable of repetition, yet evading review." *See, e.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). *Cf. Chandler* v. *Miller*, 520 U.S. 305, 313 n.2 (1997).

holding in addition that the Law violated the Speech or Debate Clause. Pet. App. A1-A23.[2]

3. Label Laws in Other States. Missouri was not the only State to enact such a law—and the Eighth Circuit was not the only court to invalidate it. Indeed, *no* court has upheld such a law. In 1996, voter initiatives quite similar to the Missouri law were approved in eight other States—Alaska, Arkansas, Colorado, Idaho, Maine, Nebraska, Nevada, and South Dakota. Six of those other laws were challenged in court and invalidated on various federal and state constitutional

---

[2] The State rightly does not dispute respondents' standing. Respondents have standing to challenge the provisions of the Label Law imposing a negative label on them for failing to take the term limits pledge, because that label would harm their electoral chances, and deter or alter their campaign plans. *See, e.g.*, *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 141 (1951) (upholding standing to challenge political label); J.A. 7 (complaint). As the District Court held, respondents also have standing to challenge the instructions to incumbents, and the labels imposed for not following them, because the pledge applicable to respondents expressly incorporates the incumbent instructions and labels. *See* Pet. App. 62a. The pledge reads, in part, "If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." Mo. Const. art. VIII, § 18(3). Thus, non-incumbent candidates suffer a present injury-in-fact directly traceable to the instruction provisions. If those provisions are unconstitutional, the pledge is also void, and respondents cannot be forced to suffer a negative label for not taking that pledge. The incumbent provisions also directly affect non-incumbents because the provisions deter term limits opponents from running at all, and harm their ability to raise funds and attract support. *See* J.A. 7 (instructions would deter Gralike from running). Finally, respondents also have standing as voters to challenge the incumbent provisions, which harm their ability to elect a candidate who is capable of representing their views. *See Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992); *Baker* v. *Carr*, 369 U.S. 186, 206 (1962); *Miller* v. *Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999).

grounds.[3] And in the other two states, the state attorneys general declared that the laws could not be enforced consistent with the federal Constitution. *See* Alaska Op. Att'y Gen. No. 2 (1998); Nevada Att'y Gen. Op. No. 2000-11. In 1998, California became the last State to adopt a label law, known as Proposition 225, and that law, too, was held unconstitutional. *See Bramberg* v. *Jones*, 978 P.2d 1240 (Cal. 1999).

4. The Label Law's Effect on Elections. Only California's label law was in effect long enough for it to be applied in an election before it was struck down. One of the State's *amici* contends that California's experience supports the notion that the ballot labels are not coercive. *See* Initiative & Referendum Inst. Br. 7. In fact, election results which that *amicus* omits from its brief show that, as one observer noted, "the short-lived measure may have had a major impact" on a state legislative race. Maura Dolan, *Initiative on Term-Limits Loyalty Voided*, L.A. Times, July 9, 1999, at A3.

Proposition 225 (which applied to both state and federal candidates) was enforced in a special election held in 1999 to fill the vacant 16th District seat in the state Assembly. The three Democratic candidates in the race were labeled "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," but the Green Party candidate (Audie Bock) took the pledge and was not labeled. *Id.* In the four-way contest, the former mayor of Oakland (Elihu Harris) received a plurality of the vote—48.8%—and soundly beat his two Democratic rivals, but was forced into a runoff with Bock, who had received

---

[3] *See Miller*, 169 F.3d 1119; *Barker* v. *Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998); *League of Women Voters* v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan* v. *Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997); *Morrissey* v. *State*, 951 P.2d 911 (Colo. 1998); *Simpson* v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997); *see also Opinion of the Justices*, 673 A.2d 693 (Me. 1996). In addition, in Oklahoma an initiative was invalidated before it was put to a vote. *See In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996).

only 8.7% of the vote. Harris was widely expected to win the runoff by a large margin, but in "a major upset" Bock defeated Harris by only 300 votes, becoming the first person from her party ever elected to a state legislature. *Id.* An assistant to Bock stated publicly that the label probably helped defeat Harris: " 'Did 300 people think that was an important thing?' * * * 'Probably.' " *Id.* *See also* Bob Egelko, *Term-Limits Initiative Struck Down*, Orange County Register, July 9, 1999, at A5 (term limits label "may have influenced the outcome" of the election).[4]

Thus, the public record confirms the obvious: that the ballot label can cost votes, and thus will have a coercive effect on candidates and their campaigns. *See* Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533, 1554 (1999) ("ballot notations may exert a significant influence on electoral outcomes").

5. The Label Law's Effect on Members of Congress. The various label laws also had a clear impact on Members of Congress. Shortly after those laws were enacted, Congress considered proposed term limits amendments to the Constitution. *See* 143 Cong. Rec. H458-H512 (daily ed. Feb. 12, 1997). The base proposal, offered by Rep. McCollum, would have limited Representatives to six terms.

---

[4] Proposition 225 was also in effect for the 1998 election for California's 9th Senate District seat. That race pitted a labeled Democrat against a labeled Peace and Freedom Party candidate and an unlabeled Republican. *See* Bob Egelko, *Candidates Face Ballot Labeling Over Term Limits*, San Diego Union-Trib., Aug. 23, 1998, at A3. That the labeled Democrat won the general election says very little, however, because the 9th District is "overwhelmingly Democratic." Thaai Walker, *Perata Wins Assembly, Senate Seats*, San Fran. Chron., Nov. 4, 1998, at A23. *See also* Egelko, *supra*. The labels also made no difference in the outcome of the Democratic primary since all three of the candidates in that race were labeled. *See* Robert Salladay, *Hot Battle for East Bay Senate Seat*, San Fran. Examiner, Aug. 27, 1998, at A5.

The term limits amendment contained in the label laws, by contrast, would limit Representatives to only *three* terms, and each proposed amendment was slightly different from the others. Thus, to accommodate Representatives from States with such laws, the House voted on seven other proposed amendments, each of which used the exact language required by a state label law.[5] Under those laws, however, legislators who vote for any amendment that would allow representatives to serve more than three terms—even if they *also* vote in favor of the shorter limits—are branded as having "DISREGARDED VOTERS' INSTRUCTIONS." *See, e.g.*, Mo. Const. art. VIII, § 17(2)(f). As the sponsor of one term limits bill explained: "Let us say you are from Missouri * * *. If you vote for the 6-year bill as required in the initiative and you also vote for my 8-year bill, your voters will be told that you do not support term limits on the next ballot." 143 Cong. Rec. H462 (Feb. 12, 1997) (statement of Rep. Fowler).

Numerous legislators from states with label laws, who would otherwise have supported the McCollum proposal, voted against it because of those laws. As Rep. Hutchinson of Arkansas stated, he voted against the McCollum proposal "not because I am opposed to term limits but because this particular resolution does not comply with the term limit instructions approved by the voters and the people of Arkansas * * *. *Id.* at H486. As he explained:

> As a longtime supporter of the concept of term limits, it was my intent as a new Member of this body to support and vote for all term limit measures including 6-year,

---

[5] Rep. Blunt, who introduced the Missouri version, explained that it would "ensure that members of the Missouri delegation have the ability to vote for language that meets a verbatim test of [the] Missouri Amendment." *Id.* at H494. Or as another congressman put it: "Every State's Members get to vote on their State's term limits so they make them feel better and they do not get the scarlet letter." *Id.* at H487 (statement of Rep. Frank). In all, the House voted on 11 proposals, including 7 required by label laws.

> 8-year, and 12-year limits so as to maximize the prospects for meaningful term limits becoming law. However, *I am instructed by the Arkansas law and will vote accordingly.* [*Id.* (emphasis added).]

Similarly, Rep. Dickey of Arkansas, who "ha[d] never once voted against term limits at any time," reported that he would vote against some proposed term limits amendments because he was "duty bo[illegible]d to support" only the Arkansas version. *Id.* *See also id.* at H489 (statement of Rep. McInnis of Colorado that he "will follow th[e] instructions" and vote only for the Colorado version); *id.* at H490 (statement of Rep. Crapo of Idaho that, although he had previously voted for the McCollum proposal, he and Rep. Chenoweth "are doing as instructed by the law of the State of Idaho" and voting only for the Idaho version).[6]

Rep. Thune of South Dakota openly acknowledged the coercive force of the ballot labels. Although he had been a cosponsor of the McCollum proposal, he explained that "I had my name removed as a cosponsor" because "I realized that cosponsoring that resolution likely would have forced a negative message next to my name on the 1998 ballot." *Id.* at H499. He noted that "[t]o say the least, that notation would be undesirable to any candidate." *Id.*

In the end, the McCollum proposal received 217 votes, *id.* at H511, which was ten *fewer* votes than the same proposal had received in 1995. *See* 141 Cong. Rec. 9748 (1995). Rep. McCollum attributed the setback to the label laws. As

---

[6] The State and its *amici* make much of the fact that Rep. Emerson of Missouri voted in favor of proposals different from the Missouri law, stating that "[i]f that means I invoke a misleading scarlet letter, then so be it." *Id.* at E277 (Feb. 13, 1997). But Rep. Emerson did not think "Missouri's scarlet letter amendment" was inconsequential. *Id.* On the contrary, she called it "deceptive[ ]" and a "farce," and she warned that "ballots will soon be cluttered with inaccurate information." *Id.*

he stated before the vote, "I think there are far more than 227 Members in this body who are for term limits, and if they had their free will and did not have the scarlet letters to be put beside their name[s] in these 9 States * * * they would vote for this." 143 Cong. Rec. H510 (Feb. 12, 1997).[7]

A day earlier, he had noted "[h]ow ironic" it would be if the label laws "gridlock[ed] this body [so that] we never reach the goal ultimately of getting to term limits." *Id.* at H418 (Feb. 11, 1997). It appears that the label laws had precisely that effect. By forcing legislators to support only their own State's version of term limits, the laws proved to be an obstacle to deliberation, compromise, and judgment, and hurt, rather than helped, the cause of term limits.

SUMMARY OF ARGUMENT

The Label Law—for many of the same reasons—contravenes at least *five* separate constitutional provisions. Under those provisions, the Label Law is invalid both because States have no delegated power to destroy the neutrality of federal elections by singling out preferred issues and candidates on the ballot, and because the State may not use its control over the ballot to impair the freedom of candidates and voters to determine for themselves the content of campaign and legislative debate. The ballot is a neutral means for voters to express their political preferences; it is not a means for a state government to decide the issues upon which federal elections will be waged, or to bludgeon candidates into supporting federal legislation favored by the State.

First, the Label Law exceeds the State's authority under the Elections Clause to enact procedural regulations governing the "Times, Places and Manner" of elections, because the Law is predicated on the content of candidates' views, and seeks to skew elections against a disfavored class. *Second*, the Label Law exceeds the State's authority under the Quali-

---

[7] The Missouri version was defeated 353-72. *Id.* at H497.

fications Clauses because it is an indirect attempt to handicap those disfavored candidates. As the Framers and their contemporaries made clear—in rejecting a proposal to create a "right to instruct" in the Bill of Rights, and elsewhere—the Constitution did not delegate to States the right to commandeer federal legislators through enforceable instructions like those at issue here. *Third*, the Label Law violates the First Amendment because it is a content- and viewpoint-discriminatory attempt by the state government to compel candidates to speak, and to penalize those who fail to support the State's favored viewpoint. It is also impermissibly vague. *Fourth*, the Label Law is a facial violation of the Speech or Debate Clause because it expressly seeks to coerce core legislative activities of Members of Congress. And *fifth*, the Label Law exceeds the State's role under Article V because it seeks to circumvent the deliberative function conferred on Congress in the process of proposing constitutional amendments.

ARGUMENT

I. THE LABEL LAW EXCEEDS THE STATE'S CONSTITUTIONAL AUTHORITY S

A. The Label Law Exceeds the State's Power Under the Elections and Qualifications Clauses

1. The Elections Clause delegates to state "Legislature[s]" the power to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's right to make or alter such laws (except as to the places of choosing Senators). U.S. Const. art. I, § IV, cl. 1.[8] As this Court has held, that delegation is the *only* power

[8] Relying on *Ohio ex. rel. Davis* v. *Hildebrandt*, 241 U.S. 565 (1916), the State argues that this power delegated to state *legislatures* can be exercised by popular referendum. Pet. Br. 38 n.46. *Davis*, however, rested on the fact that *Congress* had by statute authorized a referendum pursuant to its *own* Elections Clause power. 241 U.S. at 569. No such statute exists here, and the Label Law is invalid for that reason alone. *See California Democratic Party* v. *Jones*, 120 S. Ct. 2402, 2422-23 (2000) (Stevens, J., dissenting); *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 n.6 (1970) (Court may consider any argument in defense of judgment).

the States have to regulate congressional elections, because the Framers understood "that powers over the election of federal officers had to be delegated to, rather than reserved by, the States." *Thornton*, 514 U.S. at 804.[9] The Elections Clause does not give the States *carte blanche* to enact any type of election laws. Rather, "[t]he Framers intended the Elections Clause to grant States authority to create *procedural* regulations," *id.* at 832, governing just "the *mechanics* of congressional elections," *Foster* v. *Love*, 522 U.S. 67, 69 (1997) (emphases added). *See Smiley* v. *Holm*, 285 U.S. 355, 366 (1932) (Clause goes to "procedure and safeguards").

Contrary to the State's contentions (Pet. Br. 38), the Label Law exceeds Missouri's authority under the Elections Clause because it is not just a procedural or mechanical regulation.[10] Valid "time, place, and manner" regulations include many things, but the Court has made clear what is *not* included. This precise phrase is employed in First Amendment jurisprudence, and the Court has held that a valid time, place, and manner regulation of speech must be, among other things, "content neutral"—meaning that it must be " 'justified with-

[9] This holding forecloses the State's argument (Pet. Br. 25 n.37) that the Label Law falls within the powers reserved under the Ninth and Tenth Amendments. *See also Newberry* v. *United States*, 256 U.S. 232, 281 (1921) (Pitney, J., concurring in part) ("The reservation contained in the Tenth Amendment cannot properly operate upon this subject [federal elections] in favor of the state governments; they could not reserve power over a matter that had no previous existence."), *overruled on other grounds*, *United States* v. *Classic*, 313 U.S. 299, 319 (1941) (endorsing Justice Pitney's concurrence).

[10] Although the Eighth Circuit did not specifically rely on the Elections Clause, respondents expressly raised the argument below, *see* Ct. App. Br. 7-10, and the District Court ruled in their favor on the issue. *See* Pet. App. A42-A43, A45-A46.

out reference to the content of the regulated speech.' " *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation and emphasis omitted).

The Label Law fails this test for content neutrality. Indeed, not only does the Law label candidates based solely on their substantive views on a single issue—the term limits amendment—it is *viewpoint* discriminatory as well because it labels *only* those candidates who disagree with or fail to support the State's favored position on that issue. *See id.* (regulation is not content neutral if adopted "because of disagreement with the message" of the regulated speech). Just as the "time, place, and manner" test ensures government neutrality when regulating speech, so the same test, codified in the Elections Clause, ensures government neutrality in the federal election process. Under that test, the limited power delegated to the States to regulate the "procedures" and "mechanics" of elections does not include the power to regulate the appearance of candidates' names on the ballot according to the content of their views on a particular issue.

The State argues that the Label Law permissibly regulates the manner of elections by merely "disclosing information about congressional candidates." Pet. Br. 28.[11] As noted above, this argument fails because the limited power to regulate the time, place and manner of elections does not include the power to regulate ballots based on the content of a candidate's views on a particular issue. Even if these labels were truly evenhanded—which, as shown below, they are not—singling out term limits as the *only* issue labeled on the ballot would impermissibly skew campaign debate and voting decisions toward that particular issue.[12]

---

[11] In her deposition, however, petitioner herself agreed that the Label Law does *not* regulate the time, place, or manner of elections. J.A. 58 (testimony of Rebecca McDowell Cook).

[12] *None* of the other examples of ballot labels given by the State and its *amici*—such as party labels or nicknames—are predicated on the State's assessment of the content of a candidate's views on an issue. The Court need not decide here whether the Constitution would permit a State to require a party label over a candidate's objections. But while party affiliation may correlate to substantive views on some (but not all) issues, a neutral requirement that all party affiliations be listed on the ballot would not be based on the content of a candidate's views on any particular issue.

This fact is made clear by *Anderson* v. *Martin*, 375 U.S. 399 (1964), in which this Court struck down a state law labeling the race of candidates on ballots for state office. The Court said that the "vice" of this law was its "placing of the power of the State behind a racial classification that induces racial prejudice at the polls." *Id.* at 402. Although the case was decided on equal protection grounds, its reasoning is fully applicable here. The Court explained that

> by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. [*Id.*]

So too here. By placing "the power of the State" behind the ballot labels and "directing the citizen's attention to the single consideration" of term limits at the "most crucial stage in the electoral process," the State indicates that this issue "is an important—perhaps paramount—consideration in the citizen's choice," and may thereby "decisively influence" the citizen to vote based on that one issue. As the Court recognized in *Anderson*, such state-imposed, single-issue ballot labels destroy the neutrality of the electoral process.[13]

---

[13] *Anderson* refutes the State's claim that there must be record evidence of the ballot labels' tendency to affect voters and candi-

2. The Court has also held that the Elections Clause is not "a source of power to dictate electoral outcomes, *to favor or disfavor a class of candidates*, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-834 (emphasis added).[14] The Label Law falls squarely within that

---

dates. Pet. Br. 30 n.40. *Anderson* makes clear that the effect of a ballot label is a question of law for which specific proof is unnecessary. *Cf. Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799-800 (1988) (relying on "predictable result" of compelled disclosure); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 569 (1980) (accepting without empirical evidence the "immediate connection" between advertising and demand). In any event, the self-proclaimed premise of the Label Law is that voters will react to the labels. *See also* Garrett, 85 Va. L. Rev. at 1577-78 ("Because the notation is placed on the official ballot, voters exposed to the misleading information are a captive audience placed in an environment where they ascribe heightened credibility to the information."). As in *Anderson*, moreover, the relevant issue is whether the labels and instructions may tend to influence some voters and candidates, not whether they would necessarily affect every voter and every candidate, or alter the outcome of every election.

[14] Alexander Hamilton rejected the argument that the Elections Clause "might be employed in such a manner as to promote the election of some favorite class of men." *The Federalist No. 60*, at 367 (Clinton Rossiter ed., 1961). Rebutting the claim that the Clause might be used to favor the wealthy, he said that this "forms no part of the power to be conferred * * *. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *Id.* at 371 (emphasis in original). Justice Story, too, saw the impropriety of using the Elections Clause "to promote the election of some favorite candidate." 3 Joseph Story, Commentaries on the Constitution of the United States § 818 (1833). *See Thornton*, 514 U.S. at 833; *Newberry*, 256 U.S. at 255-256; *id.* at 283-284 (Pitney, J., concurring in part); *see also* Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 Cornell L. Rev. 109, 114 (1996) (Elections Clause does not permit States "to substantively discour-

prohibited category of regulations. The intended purpose and obvious effect of the law is to disfavor and handicap a particular class of candidates—those who refuse to follow, or pledge to follow, the term limits instructions. Indeed, the avowed intent of the law is to cause the adoption of a particular constitutional amendment by influencing candidate and voter behavior. *See* Mo. Const. art. VIII, § 15 (expressing "intention that this initiative lead to the adoption of the following U.S. Constitutional Amendment"). Under the Elections Clause, the State may enact evenhanded voting regulations, but it may not place its thumb on the electoral scale so as to help some candidates and hurt others based on the content of their political views.[15]

The labels in question do not simply impart information in a neutral way but rather cast aspersions on candidates because of their stance on a single issue. It is not merely informational to say that a candidate "DISREGARDED" voter instructions—a loaded term connoting disrespect and inattention to the views of the voter who reads it. *See* Webster's Third New International Dictionary ("Webster's") 655 (1986) ("Disregard," means "to treat without fitting respect or attention," "to treat as unworthy of regard or notice," and "to give no thought to" or "pay no attention to"). Indeed, because the label does not say what the "instructions"

---

age or interfere with political competition among aspiring participants"); *cf. Miller*, 169 F.3d at 1125-26 (label law "place[s] the state's official stamp of disapproval on a specific group of candidates, namely, those whom the state disfavors because of their views on a single political issue" and hence is "an improper exercise of Nebraska's authority to regulate the content of its ballots").

[15] Significantly, if a *State* has the power under the Elections Clause to use ballot labels in effort to sway an election, *Congress* has the same power. But the Framers plainly could not have intended to give a majority in Congress the power to perpetuate itself in office by damaging political opponents, or non-incumbents generally, with negative ballot labels.

were, it tells each voter that his or her views on term limits have been disrespected regardless of what those views may be. And as the California experience shows, *see supra* at 7-8, to label a candidate as having "DECLINED TO PLEDGE" to support term limits—especially where candidates who *do* take the pledge are *not* labeled—clearly implies that there is something amiss about a politician who has not taken the pledge. *See* Webster's at 586, 1739 ("Decline" means "to refuse to undertake, engage in, or comply with" or "reject, repudiate, [or] spurn," while "pledge" means "assure or promise the performance of" or "promise seriously."). Thus, during the critical moment a Missouri citizen examines the ballot before voting, he or she will see some candidates branded as having treated the citizen's own wishes as unworthy or without the respect or attention they are due, and others branded as having refused to make a serious assurance about a political issue deemed important by the State.

As the Eighth Circuit held, such pejorative labels cannot help but have the intended effect on voters and candidates:

> The labels are phrased in such a way they are likely to give (and we believe calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. * * * Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress. * * * The only "information" the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires. [Pet. App. A9 (citing other label law cases).]

By potentially affecting voters at the instant they vote, such labels threaten a politician's career and livelihood, and thus are as serious a coercive sanction as a fine or other penalty.[16]

---

[16] *See also Advisory Opinion to the Attorney General Re Term Limits Pledge*, 718 So. 2d 798, 803 n.3 (Fla. 1998) (label "Broke

The label laws have been rightly denounced as an "extremely dangerous and misleading manipulation of the Federal ballot." 143 Cong. Rec. H462 (Feb. 12, 1997) (statement of Rep. Fowler). *See also id.* at H419 (Feb. 11, 1997) (statement of Rep. McCollum) (such laws "set[ ] a dangerous precedent for manipulation of the Federal ballot by special interest groups"). If the Label Law is upheld, it is not farfetched to think we would soon see congressional candidates being labeled as having, for example, "OPPOSED PROTECTING AMERICAN JOBS" or "VOTED TO CUT BENEFITS FOR SENIORS." One could easily imagine other, more extreme, examples. Under the State's reasoning, such designations would be constitutional and appropriate.

They are not, because they go beyond the State's power to establish neutral election procedures, and instead allow any group that happens to have majority support in a given election to use the State's control over the ballot to determine the issues upon which future federal elections will be waged. Such a proliferation of ballot labels would "radically change the voting process," *Gwadosky*, 966 F. Supp. at 59-60 n.9, and "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 365 (1997). This the Elections Clause plainly forbids. Far from "reinvigorat[ing] American democracy," Pet. Br. 42, the Label Law seeks to corrupt it.[17]

TERM LIMITS pledge" is "obviously intended to be, and would be, a negative comment on the candidate at issue, and would potentially adversely affect that candidate's chances of being elected"); Garrett, 85 Va. L. Rev. at 1576 (label "DISREGARDED VOTERS' INSTRUCTIONS" is "likely to irritate any citizen in the voting booth long before she reads on to discover the precise issue that prompted the lawmaker's disregard," and was drafted "to evoke the strongest possible reaction from voters").

[17] *Ray* v. *Blair*, 343 U.S. 214 (1952), is not to the contrary. *See* Pet. Br. 24-25. In that case, the Court held that a State may permit

3. The Label Law contravenes the Qualifications Clauses, U.S. Const. art. I, § 2, cl. 2, § 3, cl. 3, for largely the same reasons. In *Thornton*, the Court held that the three qualifications for Congress set forth in Article I are exclusive, and that a State may not create additional ones. 514 U.S. at 806. The Court further held that a State may not *indirectly* add qualifications: "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836. This test echoes the Court's ruling that the Elections Clause forbids laws that "favor or disfavor a class of candidates." *Id.* at 833-834.

As the State admits, Pet. Br. 26, the Qualifications Clauses do not merely prevent a State from completely disqualifying candidates who meet the constitutional requirements. The law at issue in *Thornton* did not disqualify any candidate from running or serving, but rather barred candidates' names from appearing on the ballot if they had served in Congress more than a set amount of time. Thus, the petitioners in *Thornton* argued that the law did not add new qualifications, because it did not actually disqualify anyone—any person could still run as a write-in candidate. 514 U.S. at 828. The Court rejected that argument, holding that although the law did not, literally, create new qualifications, it violated the

---

a political party to require the party's candidates for the electoral college to pledge to support the party's presidential and vice-presidential nominees as an exercise of the State's constitutional authority under Article II, § 1 to appoint electors in the manner of its choice. 343 U.S. at 227. A State has no comparable power with respect to the election of Members of Congress. Moreover, *Ray* rested on the principle—not applicable here—that political parties have the associational right to determine the qualifications of their own nominees. *See, e.g., id.* at 221-222 (pledge "protects a party from intrusion by those with adverse political principles"), 225, 230. Finally, *Ray* did not decide whether such pledges could be made legally enforceable. *Id.* at 230.

Qualifications Clauses because its intended purpose and effect was to "handicap[ ] a class of candidates." *Id.* at 831.[18]

The Label Law is invalid for the same reasons. *First*, as shown above in connection with the Elections Clause, *supra* at 16-19, the Law "has the likely effect of handicapping a class of candidates," *Thornton*, 514 U.S. at 836—those who will not support the proposed amendment. *Second*, the Law "has the sole purpose of creating additional qualifications indirectly." *Id.* The Law's express intent is to cause the adoption of the proposed amendment, and it seeks to do so by skewing elections against the disfavored class. *See* Mo. Const. art. VIII, § 15; *Thornton*, 514 U.S. at 829-830 (relying on statement of intent in Arkansas law). Thus, as in *Thornton*, the Law indirectly seeks to add a new, non-procedural qualification: support for the amendment. Contrary to the State's contention (Pet. Br. 28), it is immaterial that the State seeks to impose this indirect qualification to achieve another goal: enactment of the amendment. In *Thornton*, the Arkansas law was invalid even though it sought to achieve such ancillary goals as "provid[ing] for the infusion of fresh ideas and new perspectives, and * * * decreas[ing] the likelihood that representatives will lose touch with their constituents." 514 U.S. at 837. So too here, the Label Law's ancillary goal does not justify its intended purpose to achieve that goal by handicapping a disfavored class of candidates.

B. The History of the Constitution Shows that States Have No Delegated Power to Coerce Federal Legislators Through Enforceable Instructions

The State and its *amici* argue at length that history of legislative instructions demonstrates the validity of the Label Law. In fact, history demonstrates just the opposite. The

---

[18] Contrary to the State's argument, *see* Pet. Br. 27, in reaching this conclusion in *Thornton*, the Court specifically *disavowed* any reliance on empirical evidence regarding the electoral chances of write-in candidates. 514 U.S. at 536.

idea that a State can issue legal commands to sitting or future Members of Congress, backed up by a coercive enforcement mechanism, is contrary to the history and fundamental principles of our constitutional system. This case is not about the right of the "people" to make their views known through advisory referenda or similar communications. It is, instead, about the effort of a state government to use its control over the ballot to cause federal representatives to support State-favored legislation. Far from supporting such a law, the history of the Constitution manifestly condemns it.

1. The Rejection of a "Right to Instruct"

In 1789, during the First Congress's drafting of the Bill of Rights, a proposal was made to include in what would become the First Amendment the right of the people "to instruct their Representatives." 1 Annals of Congress ("Annals") 761 (Joseph Gales ed., 1789). After much debate, the proposal was soundly defeated by a vote of 41-10. *Id.* at 776.[19] Contrary to the claims of Professor Kobach, *see* Kobach Br. 19-22, this proposal was not rejected because it was understood that a right to issue enforceable instructions already existed, but because Representatives (including prominent Framers such as James Madison and Roger Sherman) understood that such a right was contrary to the fundamental principles of the new Constitution. *See Bowsher* v. *Synar*, 478 U.S. 714, 723 (1986) (First Congress's actions are " 'contemporaneous and weighty evidence' of the Constitution's meaning").

Madison was strongly opposed to creating a right to instruct, arguing that it would be "of a doubtful, if not of a dangerous nature." 1 Annals at 767. He explained that if the right meant only that "the people have a right to express and

[19] Measured by reported text, the debate on this proposal lasted perhaps ten times longer than the debate on any other proposed provision of the First Amendment. A similar proposal failed in the Senate by a 14-2 vote, *see* Senate Journal 70 (Sept. 3, 1789), but there is no record of the debate in the Senate.

communicate their sentiments and wishes, we have provided for it already" in what would become the First Amendment. *Id.* at 766. But, he continued, "[i]f gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions, *the declaration is not true*," and such a right "obliges us to *run the risk of losing the whole system*." *Id.* at 766, 767 (emphases added). "Suppose," Madison asked, a representative "is instructed to patronize certain measures, and from circumstances known to him, but not to his constituents, he is convinced that they will endanger the public good; is he obliged to sacrifice his own judgment to them?" *Id.* at 766.

It is thus evident that Madison viewed a right to issue enforceable instructions as inconsistent with a major goal of representative democracy—to "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *The Federalist No. 10*, at 82 (Madison). In fact, during the Constitutional Convention, Madison (and James Wilson) successfully opposed a proposal that would have permitted state legislatures to appoint representatives to Congress, saying that if the legislatures have the power to appoint "they will instruct, and thereby embarrass the Delegate—*not so if the Election is by the people*." 1 The Records of the Federal Convention of 1787, at 367 (Max Farrand ed., 1966) ("Farrand") (emphasis added). Madison thus believed that popularly elected representatives could *not* be instructed.

Roger Sherman also forcefully opposed the proposal to create a right to instruct. For him, the idea was at odds with Congress's role as a deliberative body comprised of representatives open to persuasion and compromise and serving not merely the narrow interests of a few, but the common good of the Nation. These were his words:

> [*T*]*he words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting.* I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him. From hence I think it may be fairly inferred, that the right of the people to consult for the common good can go no further than to petition the Legislature, or apply for a redress of grievances. It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and, after he has discovered them, to give them his support. Should his instructions, therefore, coincide with his ideas on any measure, they would be unnecessary; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them. [1 Annals at 763-764 (emphasis added).]

Many others also spoke out against the proposed right, likewise making clear that it would subvert the principles of the Constitution. George Clymer of Pennsylvania, another Framer, declared that a right to issue enforceable instructions would be "a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments" and would "render[ ] Congress a mere passive machine." *Id.* at 763. Maryland's Thomas Stone said that such a right would be "subversive of the principles of the constitution" and "change the Government entirely." *Id.* at 767-768. He added that this was "a power not to be found in any part of

the earth except among the Swiss cantons" and that "here we have a different form of Government." *Id.* at 768.[20]

The rejection of the right to instruct confirmed that the Framers intended for Congress to be a deliberative body in which representatives, while mindful of their local constituency, meet to debate and legislate in the *national* interest. *See INS* v. *Chadha*, 462 U.S. 919, 959 (1983) ("The records of the Convention and debates in the states preceding ratification * * * [show an] unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process").[21] The Constitution established a *representative* democracy—a system that gives the people the power, not to make the laws themselves, but to elect those who do. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); *cf. id.* art. IV, § 4, cl. 1 (guaranteeing "a Republican Form of Government"). As the debates of the First Congress make clear, "[i]nstruction would have completely undermined the Madisonian system of deliberation among refined representatives." Akhil Reed

---

[20] *See also* 1 Annals at 762 ("[W]ere all the members to take their seats in order to obey instructions, and those instructions were as various as it is probable they would be, what possibility would there exist of so accommodating each to the other as to produce any act whatever?") (statement of Rep. Hartley); *id.* at 764 ("Let the people consult and give their opinion; let the representative judge of it: and if it is just, let him govern himself by it as a good member ought to do; but if it is otherwise, let him have it in his power to reject their advice.") (statement of Rep. Jackson); *id* at 772 ("Instructions have frequently been given to the representatives of the United States; but the people did not claim as a right that they should have any obligation upon the representatives; it is not right that they should.") (statement of Rep. Wadsworth).

[21] Ensuring deliberation is one reason why the Constitution requires the Members of Congress to gather together in person. *See* U.S. Const. art. I, § 4, cl. 2.

Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1154 (1991). Or as Noah Webster put it at the time, instructions "subvert the very principles of republican government" because "[t]hey make the opinions of a small part of the state a rule for the whole—they imply a decision of a question, before it is heard—[and] they reduce a Representative to a mere machine, by restraining the exercise of his reason." Noah Webster, *Government*, The American Magazine 204, 207 (Mar. 1788) (writing as "Giles Hickory").[22]

As the 1997 experience in Congress demonstrates, the Label Law is fundamentally inconsistent with these principles of deliberative, representative democracy. The label laws' legal commands to representatives, enforced through coercive ballot labels, prevented them from deliberating and compromising to enact legislation according to their views of the national interest. In the words of Roger Sherman, the laws "destroy[ed] the object of their meeting." 1 Annals at 763. The rejection by the Framers and their contemporaries of the right to instruct was a wholesale rejection of the idea that the Constitution gives the States the power to coerce the actions of federal legislators through enforceable legal commands like those at issue here. *See Miller*, 169 F.3d at 1124.

---

[22] *See also* Amar, 100 Yale L.J. at 1154-55 ("all of Madison's central arguments in *The Federalist* No. 10 are premised on a repudiation of the idea of instruction"); Cass R. Sunstein, Democracy and the Problem of Free Speech 242 (1993) ("For the founding generation, a right to instruct was thought to be inconsistent with the point of meeting, which was deliberation."); Thomas E. Cronin, Direct Democracy 25 (1989); Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 591 n.51 (1996); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 172 (1995); George F. Will, *Save Us From the Purists*, Newsweek, Feb. 17, 1997, at 76 (label laws are "pernicious" and a "device that degrades what the [term limits] movement seeks to dignify—the principle of deliberative representation").

2. Pre-Constitutional History Does Not Support the Validity of the Label Law

The State and its *amici* attempt to defend the Label Law with historical evidence of constituents instructing legislators in this country. *See, e.g.*, Pet. Br. 10-17; Kobach Br. 4-19. The history they rely on, however, is not up to the task.

To begin with, in all the history they recount, there is *no* example of any instruction comparable to the Label Law—that is, an instruction framed as a formal legal command and enforced through coercive sanctions imposed by the government through its control over the ballot. *See* Kobach Br. 5 ("no formal legal mechanism compelled the [colonial legislator] to obey his instructions"); Pet. Br. 14 n.13 (no history of labels being used to enforce instructions). The one example we have of a proposal to give instructions the force of law is the *rejected* proposal to include a right to instruct in the First Amendment. The State and Professor Kobach argue that early instructions needed no enforcement because "no self respecting member of Congress" would have ignored them, Pet. Br. 14 n.13, and because the political culture of the time made them "de facto binding." Kobach Br. 5, 15, 23. The fact remains, however, that the Label Law is quite different from the historical instructions. It is one thing to receive an instruction and choose to follow it; it is quite another for the instruction to be codified as a legal command and given a government-imposed sanction for its violation.[23]

---

[23] An example cited by Professor Kobach proves the point. Delaware's delegates to the Constitutional Convention had been instructed not to vote for any constitution denying the States equal representation in Congress. *See* Kobach Br. 10. But the ability of delegates to compromise on that point—through the establishment of the House and the Senate—was a critical factor in the creation of the Nation. Had Delaware's delegates been under a legal command, or had they faced governmental retribution for failing to follow that command, there might never have been a Constitution.

Just as importantly, examples of instructions prior to the Framing prove nothing, for, as noted above, the Framers rejected such instructions as incompatible with the new system of a deliberative, representative Congress that would act in the national interest. *See* Cronin, *supra*, at 24 ("Not until the late 1780s did Americans begin to challenge the doctrine of binding instructions. Hamilton and Madison led the charge."). A central weakness of the Articles of Confederation—which the Constitution was intended to overcome—was the lack of a truly national legislature in which representatives could enact laws in the national interest free from the threat of recall by their States. As one Senator noted in 1858, the practice of instructions

> had its origin * * * under the Confederation, when the States not only claimed, but had the power, to instruct their representatives in Congress, and to recall them too, they being nothing more than [a]mbassadors from independent sovereignties attending a general Congress of the States. * * * This doctrine, so far from having any support in the Constitution, in my judgment is directly at war both with the spirit and literal provisions of the Constitution. [Cong. Globe, 35th Cong., Spec. Sess. of the Senate 805 (1858) (statement of Sen. Bell).]

Thus, it is not surprising that neither the State nor its *amici* point to a single instance of an instruction issued to popularly elected federal representatives after the Framing.[24]

The practice of instructions prior to the Framing had considerable opposition—including by some of the most influential statesmen of the day. Perhaps the most famous expression of opposition can be found in a 1774 speech delivered by Edmund Burke to his Bristol constituents. Burke said that although a representative should heed his constituents' views, he "owes you, not his industry only, but his judgment; and he

---

[24] The practice of State legislatures instructing Senators whom they selected raises separate issues. *See infra* at 30-31.

betrays, instead of serving you, if he sacrifices it to your opinion." 1 The Founders' Constitution 392 (Philip B. Kurland & Ralph Lerner eds., 1987). As he stated, legislation is a matter of reason, "and what sort of reason is that, in which the determination precedes the discussion [and] in which one set of men deliberate, and another decide." *Id.* Burke thus rejected "*authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience." *Id.* (emphasis in original).

Reflecting the Burkean view, many of the Framers expressed the view that States had no right to instruct Members of Congress. *Cf.* Russell Kirk, The Conservative Constitution ix-x, 82-89, 94-95 (1990) (describing Burke's influence on the Framers and the Constitution); Cronin, *supra*, at 28 (same). Madison's views are made clear by his remarks in the First Congress and in *The Federalist*. *See supra* at 22-23. In 1786, George Washington likewise objected that legal commands to national representatives would impair deliberation. As he stated, in national matters "the *sense*, but not the *Law* of the District may be given, leaving the Delegates to judge from the nature of the case and the evidence before them." 1 Founders' Constitution 399 (emphasis in original). John Adams believed that States had no right to instruct federal representatives even in a purely advisory capacity: "Upon principle, I see no right in our Senate and House to dictate, nor to advise, nor to request our representatives in Congress." Letter to J.B. Varnum, Dec. 26, 1808, in 9 The Works of John Adams 605 (Charles F. Adams ed., 1969).[25]

---

[25] Although Alexander Hamilton stated in passing during New York's ratifying convention that the people "have it in their power to instruct their representatives," he also said that "[t]here are certain conjunctures, when it may be necessary and proper [for a legislator] to disregard the opinions which the majority of the people have formed." 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 252 (2d

Finally, in 1788, Patrick Henry, a proponent of instruction, spoke against the proposed Constitution during the Virginia ratifying convention on the ground that instructions to federal legislators could *not* be enforced: "[C]an you in this government recall your senators? Or can you instruct them? You cannot recall them. You may instruct them, and offer your opinions; but if they think them improper, they may disregard them." 3 Elliot's Debates at 355. As he stated, "[d]elegates may be called and instructed under the present system, but not by the new Constitution." *Id.* at 354.

3. Post-Constitutional History Does Not Support the Validity of the Label Law

As the State and its *amici* note, prior to the popular election of Senators, some State legislatures issued non-binding instructions to the Senators they selected. *See, e.g.*, Pet. Br. 13; Kobach Br. 17. But this practice—which declined after 1840 and was "obsolete" by 1860, Cronin, *supra*, at 26—says nothing about the proper interpretation of the Constitution. *See Thornton*, 514 U.S. at 823 ("One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States."). Indeed, the constitutionality of the practice was never determined, *see* Levmore, 82 Va. L. Rev. at 592 & n.54; Currie, *supra*, at 173; and it was always controversial and far from universally accepted. *See* Roy Swanstrom, *The United States Senate 1787-1801*, S. Doc. No. 87-64, at 171 (1961) ("in these precedent-making days [1789-1801] there was no unanimity of sentiment on the question of" state

---

ed. 1836) ("Elliot's Debates"). The latter view is more in line with his writings as *Publius*. *See The Federalist No. 71*, at 432 ("When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.").

instructions to Senators); Vik D. Amar, *The Senate and the Constitution*, 97 Yale L.J. 1111, 1117 n.32 (1988).[26]

But even if this practice bore on the meaning of the Constitution, it says nothing about the validity of the Label Law. Prior to the Seventeenth Amendment, instructions by legislatures to the Senators they chose were "widely regarded as a logical concomitant of the concept that the Senate was the special representative of the sovereignty left to the States." Swanstrom, *supra*, at 160. *See also* William E. Dodd, *The Principle of Instructing United States Senators*, 1 S. Atlantic Q. 326, 327 (1902). It is one thing for a legislature to make its current views known to the individuals it alone selects; it is quite another for a state government to use its control over the ballot to enforce outdated legal commands imposed on *popularly elected* representatives, including House members who represent a single District rather than the entire State.

The State and its *amici* also rely on state laws—some of which had ballot label provisions—regarding the selection of Senators prior to the Seventeenth Amendment. *See* Pet. Br. 14-16; Missouri Term Limits Br. 14-18; Nebraska Br. 17-20. These Twentieth Century laws have no bearing on the interpretation of the Constitution. *See Thornton*, 514 U.S. at 826-827 n.41 ("[A]s one moves away from 1789, it seems to us that state practice is even less indicative of the Framers' understanding of state power."). It is not true, however, that

---

[26] In the First Congress, North Carolina's Senators refused to obey instructions given them, as did one of Maryland's. *See* Swanstrom, *supra*, at 162-165, 169. To Ralph Izard of South Carolina, "legislatures had no more right to instruct Senators than electors had to instruct the President," *id.* at 169, while Oliver Ellsworth of Connecticut said that instructions "amounted to no more than a wish, and ought to be no further regarded." Journal of William Maclay 399 (Edgar S. Maclay ed., 1890). *See also supra* at 28; 30 Annals of Congress 577 (1817) (statement of Rep. John C. Calhoun) ("I too * * * am an advocate for instruction. I am instructed. The Constitution is my letter of instruction.").

the Label Law is "indistinguishable" from these laws. Missouri Term Limits Br. 14-15. The cited laws were entirely permissive—candidates were *allowed* but not *required* to take a pledge or carry a ballot label—and the laws contained neither instructions nor "DISREGARDED INSTRUCTIONS" labels. *See id.* at 14-18, 1a-4a. Moreover, the laws (1) involved only elections for *state* office—thus the Elections Clause, the Qualifications Clauses, the Speech or Debate Clause, and Article V did not apply to them; and (2) existed before the First Amendment was incorporated against the States, *see McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995). Finally, one state court struck down a *mandatory* pledge law on state constitutional grounds. *See State ex rel. McCue* v. *Blaisdell*, 118 N.W. 141, 144-145 (N.D. 1908).[27]

4. The Label Law Violates Principles of Federalism

The history recounted above demonstrates that the Constitution was not intended to confer upon the States the power to use their control over the ballot to coerce federal legislative debate through enforceable instructions. Indeed, principles of federalism negate any such power. The Court has held that Congress may not "commandeer" state officers—including state legislators—into enforcing a program or enacting a law to serve a federal agenda. *Printz* v. *United*

[27] The State and its *amici* also note that some States sought to bind delegates to conventions called to consider ratification of the Twenty-First Amendment. *See* Pet. Br. 17; Kobach Br. 18-19; Missouri Term Limits Br. 18-21; Nebraska Br. 15-17. Assuming *arguendo* that a State has broad power to structure and regulate its own convention, including the selection and conduct of convention delegates, *see In re Opinion of the Justices*, 148 So. 107, 110 (Ala. 1933), a State surely has no comparable power over the election or acts of Members of Congress, who are federal officers beyond a State's control. Moreover, these laws are not content-based—they simply require a delegate to disclose the way he or she will vote on the *only* issue to be considered at the ratifying convention.

States, 521 U.S. 898, 925 (1997); *New York* v. *United States*, 505 U.S. 144, 161 (1992). The federal government therefore may not "require the States to govern *according to Congress' instructions*." *Id.* at 162 (emphasis added).

Of course, the principle also works the other way and forbids States from issuing directives to federal legislators. As the Court explained in *Printz*:

> It is no more compatible with this independence and autonomy [of States] that their officers be "dragooned" * * * into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws. [521 U.S. at 928.[28]]

The conscription of federal officers into state service is, however, exactly what Missouri has attempted here. The State has ordered each federal legislator from Missouri, on penalty of a negative ballot label, to use all of his or her authority to enact the State's proposed term limits amendment. This is a clear violation of "the independence and autonomy of the United States." *Id.* *See Opinion of the Justices*, 673 A.2d at 696 (instruction on term limits invalid because "neither the electors of the State of Maine nor the Legislature of the State of Maine may control the state's delegates to the United States Congress in the performance of their congressional duties. Such an exercise of control would violate the essence of federalism.").

Under the Constitution—unlike the Articles of Confederation—Members of Congress are not mere envoys or emissaries of the State from which they come, but are, first and foremost, federal officers:

[28] *See also Thornton*, 514 U.S. at 841 (Kennedy, J., concurring) ("That the States may not invade the sphere of federal sovereignty is as incontestable * * * as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.").

> In th[e] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, *nor controllable by, the states* * * *." [*Thornton*, 514 U.S. at 803 (quoting 1 Story, *supra*, § 627) (emphasis added).[29]]

The historical record is clear that while federal representatives must obviously pay heed to the expressed wishes of their constituents, they must also have the ability to determine for themselves, free from state government coercion, how they will vote in the national interest.

II. THE LABEL LAW VIOLATES THE FIRST AMENDMENT

The Label Law regulates core political speech of candidates and legislators in both a content- and viewpoint-based manner. The Law compels candidates to express views on one, and only one, issue; it compels legislators to vote in a certain way; and it punishes with pejorative labels those who fail to support the State's favored view. Missouri has thus used its control over the ballot to advance one side of a political debate in an effort to sway the outcome of elections. As shown below, the First Amendment was intended precisely to prohibit such heavy-handed governmental interference with the free flow of political discourse.

A. The Label Law is Subject to Strict Scrutiny

The State contends that the Label Law is not subject to the First Amendment because it involves only the "behavior" of

---

[29] That Members of Congress do not "owe their allegiance" to the States is shown by the facts that their salaries are paid for out of the Treasury, *Thornton*, 514 U.S. at 804, and that the Framers rejected a proposal allowing States to recall their representatives, *see id.* at 810 n.20; *cf.* Articles of Confederation, art. V.

voting, and of taking (or not taking) a pledge. *See* Pet. Br. 32-33. This argument cannot be taken seriously. The Law labels non-incumbent candidates according to whether they take a "pledge," and reciting a pledge is, of course, a classic form of speech. *See West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). Furthermore, the Law instructs incumbents to vote in favor of the proposed constitutional amendment. Voting by legislators—like all of the other legislative activities compelled by the Label Law—is plainly an expression of political opinion protected by the First Amendment.[30]

The Label Law is subject to the First Amendment because it compels speech. The First Amendment prohibits a State from forcing a person to speak publicly, *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 559 (1985), or to respond to the views of others, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 11 (1986). The Court has therefore held that compelled disclosures by political candidates face exacting scrutiny. *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976). And "[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991).

Through the mechanism of the pledge, the Label Law forces candidates publicly to express views—one way or the other—on the proposed term limits amendment, and only that issue, to 100% of the voters at the very moment they cast

---

[30] *See Bond* v. *Floyd*, 385 U.S. 116, 135-136 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); *Stella* v. *Kelley*, 63 F.3d 71, 75-76 (1st Cir. 1995) ("beyond serious question" that voting by public officials "comes within the heartland of First Amendment doctrine"); *Clarke* v. *United States*, 886 F.2d 404, 411 (D.C. Cir. 1989) (" 'we have no difficulty ' " concluding the same) (citation omitted), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc). *Cf. Spallone* v. *United States*, 493 U.S. 265, 274 (1990).

their ballots. And the Law expressly compels—indeed, instructs—representatives to speak in certain ways. The Label Law thus plainly compels speech, with the effect of distorting the content of campaigns and legislative activities, and the conduct of voters. A candidate may wish to base his or her campaign on numerous issues—none of which involves term limits—yet, when a voter enters the ballot box, term limits will be the *only* issue upon which any candidate's purported views are shown. By requiring candidates to express a view on a single issue to all of the voters, the Label Law impermissibly "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas*, 475 U.S. at 9. *See also Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) (government "may not select which issues are worth discussing or debating in public facilities").

The Law also compels speech because its labels force candidates to advertise a message selected by the State. *See Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). The Law not only compels candidates to speak on a given topic, but it forces them to use words written by the State. The State argues that "nothing in [the labels'] placement or content suggests that the message is the candidate's own," Pet. Br. 32, but the same might have been said of the license plates at issue in *Wooley*. It would be inconceivable to argue that the First Amendment would permit the State to force candidates who oppose a constitutional amendment to ban flag burning to identify themselves, and then post a sign outside their homes saying "I OPPOSE PROTECTING THE FLAG." But that is exactly the kind of speech the Label Law compels.

Finally, the Label Law is also subject to the First Amendment because it uses the State's ballot monopoly to penalize candidates for their failure to endorse the State's favored position. The Law uses pejorative labels to punish candidates who disagree with the State, and to coerce the support of those who remain ambivalent or undecided. *See supra* at 16-19. This contravenes the core right of individuals to

speak freely about matters of public concern without fear of subsequent government retribution. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940). As the Court has held, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977). Contrary to the State's assertion, the Label Law does not simply "comment" on candidates. Pet. Br. 30. In this context, the State is not just one of many voices commenting on issues in the public arena. Rather, the State has used its sole control over the ballot—a power unavailable to others—to influence both candidate and voter behavior on a single issue through negative labels seen by all voters just before they cast their ballots. *Cf. Anderson* v. *Martin*, 375 U.S. 399.

The State nevertheless contends that even if the Label Law affects speech, it is subject not to strict scrutiny but rather to a balancing test applied to neutral election regulations such as filing fees and deadlines.[31] The State is wrong. In *McIntyre* v. *Ohio Elections Commission*, *supra*, the Court invalidated a law compelling individuals to place their names on any written material intended to influence voters. Rejecting the cases relied on by the State here, the Court held that the law warranted strict scrutiny because it was not "an ordinary election restriction," as it did "not control the mechanics of the electoral process." 514 U.S. at 345-346. *See also Burdick*, 504 U.S. at 438 (ballot access cases involve "reasonable, politically neutral" regulations).

The Label Law warrants strict scrutiny under this standard because, as explained above in connection with the Elections

---

[31] *See, e.g., Burdick* v. *Takushi*, 504 U.S. 428 (1992); *Tashjian* v. *Republican Party*, 479 U.S. 208 (1986); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Storer* v. *Brown*, 415 U.S. 724 (1974); Pet. Br. 35-36, 39.

Clause, it is it is not a neutral regulation of the mechanics of elections, but rather is content- and viewpoint-based. *See supra* at 12-15. Content-based speech regulations are subject to strict scrutiny,[32] and are "presumptively invalid." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). The Label Law is content-based because it singles out speech on a particular subject matter—the proposed term limits amendment—and only that subject matter. *See McIntyre*, 514 U.S. at 345; *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 533-535 (1980). The Law, in fact, is even more objectionable. Under the First Amendment, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 829 (1995). Such viewpoint discrimination is a particularly egregious form of content discrimination. *Id.* The Label Law is viewpoint-based, because it seeks to advance a particular substantive position. It would be bad enough if the State merely singled out term limits as the only issue upon which candidates could express their views on the ballot; it is far worse for the State to pick only one side of the issue and pejoratively label only those who disagree with that position. Unlike the disclosure law considered in *McIntyre*, which "applie[d] evenhandedly to advocates of differing viewpoints," 514 U.S. at 345, the Label Law does not label those candidates who support the State's position.

Viewpoint-based laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994). That is exactly what the Label Law does. The State's express

[32] *See United States* v. *Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000); *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (plurality); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

intent is to cause the adoption of the proposed amendment and, to realize this goal, it uses its control over the ballot to tar only those who oppose it with negative labels designed to harm their electoral chances if they run at all.

For all these reasons, the Label Law warrants strict scrutiny, which, as shown below, it cannot withstand.

B. The Label Law Cannot Withstand Strict Scrutiny

The Label Law operates in an area—political speech—where the First Amendment is "at its zenith." *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988). Because the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), the State's burden to sustain the Label Law "is well-nigh insurmountable." *Meyer*, 486 U.S. at 425.[33] The State has not surmounted that burden. To satisfy strict scrutiny, a law "must be narrowly tailored to promote a compelling Government interest." *Playboy*, 120 S. Ct. at 1886. The Label Law is not.

The State first contends that the Label Law serves the interest of the "people" in "preserving their voice in government." Pet. Br. 38. While there is nothing wrong with preserving the legitimate "voice" of the "people" in government, the Label Law has nothing to do with that interest. The people of Missouri may express their views through the electoral process, and through their right to petition their representatives. The Label Law, however, is an attempt by the *government* of Missouri to cause the enactment of federal legislation by using its control over the ballot to coerce and penalize those who oppose it. *See Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 295 (1981) ("[T]the voters

[33] *See also Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982); *Buckley*, 424 U.S. at 52-53; *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."). Such an objective is anathema to the core values of the First Amendment. Moreover, this Court has rejected a claimed right to "us[e] the ballot to communicate to the public" and "to send a particularized message" to the voters. *Timmons*, 520 U.S. at 362, 363. As the Court held, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Id.* *See Georges* v. *Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (ballot is "not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down").

The State next asserts that the Label Law furthers the voters' right to receive information about candidates. Pet. Br. 39. But the State has no compelling interest in singling out for the voters only *one* issue, much less in handicapping candidates who disagree with the State's favored position. *See* Pet. App. A13. Indeed, the Court has held that the interest of educating voters does not even justify a content-neutral ballot regulation dealing with the time for filing candidacy petitions. *Anderson* v. *Celebrezze*, 460 U.S. at 796-798. As the Court held, the First Amendment "reflect[s] a greater faith in the ability of individual voters to inform *themselves* about campaign issues." *Id.* at 797 (emphasis supplied). In fact, the Label Law *disserves* the voter's interest in receiving information, because it dissuades term limits opponents from entering the marketplace of ideas.

Nor is there a compelling interest in forcing candidates to speak on an issue upon which they have not decided to campaign. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a [speaker] make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348. That is because the First Amendment "mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-791.

Even if the State had a compelling interest in informing the voters *only* about term limits, the Label Law is not narrowly tailored to promote that interest because its labels are inaccurate and misleading. *First*, the "voters" whose "instructions" an incumbent candidate has purportedly "disregarded" only represented a majority of statewide initiative voters in 1996. As the State admits, "[t]he voters in subsequent years might have a different political view," Pet. Br. 21, yet the Label Law continues until its goal has been attained. *Second*, the Law will label a candidate as having "disregarded" the voters' instructions even if a majority of voters in his or her congressional district actually *opposes* term limits. *See id.* (noting that 28 counties failed to support Label Law). *Third*, the Law will brand as opposing term limits a candidate who *supports* term limits, but not the particular form of them prescribed in the proposed constitutional amendment. Pet. App. A12 n.7, A14; *supra* at 9. *Fourth*, the labels in fact provide little, if any, useful information, as neither label tells the voter what the pledge said or what the instructions were.[34]

---

[34] The Label Law is also unconstitutionally vague. *See* Gralike Ct. App. Br. 45-49. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The Label Law fails this "strict" test. *Id.* at 432. Petitioner, who decides if candidates will be labeled, *admitted* that the Law provides "no guidance" and puts her in an "untenable position" on a number of issues. J.A. 60, 51; *see* J.A. 61-65. She also voted against the law because it did not provide adequate guidance. J.A. 50. Indeed, her office unsuccessfully sought clarifying legislation, J.A. 34-35, and Colorado Representatives likewise found it necessary to obtain the state Attorney General's opinion on how to comply with Colorado's label law. 143 Cong. Rec. H488 (Feb. 12, 1997). The Label Law thus "impermissibly delegates basic policy matters * * * for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The potential for political abuse here is great, as the Label Law would

The State also argues that the Label Law only minimally impacts First Amendment rights because so long as a candidate follows the voting instructions or takes the pledge, she is free to say anything else about term limits without incurring a sanction, and may even "disassociate herself from these actions." Pet. Br. 37; *see id.* at 33 & n.43. A law that impairs free expression, however, cannot pass muster on the theory that other opportunities for speech remain. *See, e.g., California Democratic Party*, 120 S. Ct. at 2412 ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.") (citation omitted). Nor can an otherwise impermissible compulsion of speech be sustained on the view that the speaker can disavow the message. It would be no answer to say to the motorists in *Wooley* that they can apply a bumper sticker disagreeing with the motto on their license plate, or to the parading veterans in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), that they can explain after the march why they did not want a group of gay Bostonians to join them.

In fact, a central vice of the Label Law is that candidates have *no* opportunity to express contrary views or disassociate themselves from the labels after the voters see them. Not only do candidates lack the ability to express a contrary message on the ballot, but in Missouri (like many States) they are forbidden to deliver a message to voters anywhere near the ballot box on election day. *See* Mo. Rev. Stat. § 115.637(18). The State thus intrudes inside the ballot box—the place where its coercion will be most effective—while preventing candidates from countering that effect. *See*

---

have an elected official from one political party determining, with minimal guidance, whether members of other political parties should receive pejorative ballot labels based on their political views. And the Law's biased review provisions, *see supra* at 5, would give ample cover for any politically motivated decision.

Riley, 487 U.S. at 800 (compelled disclosure invalid where individual "will not likely be given a chance to explain" it).

Finally, the Label Law is not narrowly tailored because there are less restrictive alternatives for achieving the State's asserted interests. *See, e.g., Boos* v. *Barry*, 485 U.S. 312, 329 (1988). There are a host of ways the State could inform the electorate about candidate's positions without violating the First Amendment. It could sponsor voluntary debates. It could publish a pamphlet for voters containing statements by candidates, without requiring a candidate to submit a statement or restricting the issues covered. *See, e.g.*, Cal. Elec. Code § 13307; N.J. Stat. Ann. 19:44A-37. Or it could leave space on the ballot for candidates to express a brief message of their choosing. If the goal of the Label Law were truly to educate the electorate—rather than to coerce candidates and voters—it would have employed one of these means instead. *See R.A.V.*, 505 U.S. at 395 (existence of content-neutral alternatives "cast[s] considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the law' ") (quoting *Burson*, 504 U.S. at 213).

III. THE LABEL LAW VIOLATES THE SPEECH or DEBATE CLAUSE

The Label Law is a facial violation of the Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The State does not dispute that the Law targets core legislative activity within the ambit of the Clause.[35] The Law

---

[35] *See, e.g., Gravel* v. *United States*, 408 U.S. 606, 624, 625 (1972) (Clause protects "voting by Members" and anything else that is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings * * * ."); *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880) (Clause protects not only "words spoken in debate" but also

"instructs" Members of Congress to use "all of [their] delegated powers to pass" the proposed amendment, and asks non-incumbent candidates to pledge to follow that instruction. Mo. Const. art. VIII, § 17. And it directly intrudes upon the legislative process by, for example, requiring a legislator to "second the proposed [amendment] if it lacks for a second" and to "reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of the proposed [amendment]." *Id.* § 17(2)(b), (e).

Instead, the State argues that the Speech or Debate Clause does not apply here because it protects legislators only against prosecution or its equivalent. Pet. Br. 44. The State's own recitation of the governing law belies its argument. As the State notes (*id.* at 43), the "fundamental purpose" of the Clause is to "free[ ] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618.[36] The Label Law plainly imposes both executive and judicial oversight that "realistically threatens" to control legislative conduct. It dictates the content of legislative activity as a matter of Missouri law—on penalty of a negative ballot label—and is expressly intended to coerce that activity. The labels are affixed by the state executive—the Secretary of State—after she has audited representatives' actions in Congress. And the Law provides for judicial proceedings, in which a legislator who seeks to avoid a label will have to explain and justify his or her legislative activities, including in suits brought by any dissatisfied voter.

---

anything "done in a session of the House by one of its members in relation to the business before it").

[36] The State does not, and cannot, dispute that the Clause prevents interference from both federal and state governments. *See, e.g.*, *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979) (applying Clause to state court civil action); *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408 (D.C. Cir. 1995) (same).

The Speech or Debate Clause does not simply provide an immunity from prosecution or judicial proceedings. The Clause was directly modeled after the corresponding privilege accorded Members of Parliament in England. *See United States* v. *Johnson*, 383 U.S. 169, 177-178 (1966). That English privilege, in turn, was enacted in response to varied threats by the sovereign against legislative independence, including such actions as "issuing direct orders to the Speaker to cease debate on sensitive topics" and "spreading rumors of royal displeasure and threats of retaliation." Robert J. Reinstein & Harvey L. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1127 (1973). *See also* Carl Wittke, The History of English Parliamentary Privilege 26-27 (1970) (noting royal orders directing Parliament not to discuss certain issues).

The language of the Clause also makes clear that it does not apply only to court proceedings. As codified, the English privilege provided "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M. Sess. 2, ch. 2 (1689). This language was carried forward almost verbatim in the penultimate version of the Constitution, which provided that "Freedom of speech and debate in the Legislature shall not be impeached or questioned *in any Court or place* out of the Legislature." 2 Farrand at 254 n.14 (emphasis added). The Committee of Style made non-substantive changes to this language, including collapsing "any Court or place" to "any other place." *Id.* at 593. Thus, the Clause was intended to protect legislators not only from judicial process, but from interference by the executive in "any other place" outside of Congress.

The Label Law, which directs the state executive (and, ultimately, the judiciary) to audit and penalize legislative behavior, plainly violates that language. The Clause must be read "broadly to effectuate its purposes." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). Its

"central role" is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel*, 408 U.S. at 617.[37] Thus, the Court has held that the principles of the Clause prevent instructions to a legislator to vote in a particular way. In *Spallone* v. *United States*, 493 U.S. 265 (1990), the Court invalidated an order directing local legislators to vote in favor of certain legislation, on penalty of contempt sanctions. Although the Court did so on equitable grounds, its decision was "informed" by considerations underlying the legislative immunity doctrine, *id.* at 278, which is co-extensive with the protections of the Speech or Debate Clause, *see Consumers Union*, 446 U.S. at 732-733. As the Court held, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." 493 U.S. at 279. Coercing legislators to vote through a threat of fines contravened this principle because such coercion was "designed to cause them to vote, not with a view to the interests of their constituents or of the city, but with a view solely to their own personal interests." *Id.*

The Label Law contravenes the Speech or Debate Clause for the same reason. Under the Law, the "intimidation of legislators by the Executive," *Gravel*, 408 U.S. at 617, is direct and severe. The Law—like the early royal edicts the

---

[37] *See also Supreme Court of Va.* v. *Consumers Union of the U.S.*, 446 U.S. 719, 731 (1980) (Clause "insure[s] that the legislative function * * * may be performed independently without fear of outside interference"); *Eastland*, 421 U.S. at 502 (same); *United States* v. *Brewster*, 408 U.S. 501, 507 (1972) (purpose is to "protect the integrity of the legislative process by insuring the independence of individual legislators"); 1 The Works of James Wilson 421 (Robert Green McCloskey ed. 1967) ("[I]t is indispensably necessary, that [a legislator] should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.").

original English privilege was intended to combat—expressly "instructs" legislators how to vote and conduct other legislative activities, and establishes state-imposed penalties intended to accomplish that result. Not surprisingly, the various label laws had a palpable effect on the behavior of Members of Congress during the short time the laws were in effect. *See supra* at 8-11. It is thus of no moment that the State enforces its instructions by using its ballot monopoly to impose a misleading and negative ballot label, rather than by fines or imprisonment. The purpose of legislative immunity is to render "[l]egislators * * * immune from deterrents to the uninhibited discharge of their legislative duty." *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). Because it uses legal sanctions to coerce representatives to vote according to the purported wishes of a majority of statewide initiative voters in 1996, the Label Law is plainly such a prohibited deterrent.

IV. THE LABEL LAW CONTRAVENES ARTICLE V

As every court to have ruled on the issue has held, coercing federal legislators into proposing a constitutional amendment contravenes Article V of the Constitution. Under Article V, the function of proposing amendments is given exclusively to deliberative, representative bodies—Congress and state legislatures. The Label Law, which uses legal commands and sanctions to cause Congress to propose an amendment, impermissibly circumvents that lawful process.

Article V assigns specific roles to various constitutional actors—and no role to some. Congress may propose amendments. State legislatures may ratify amendments, and may also compel Congress to call a national Convention for proposing amendments. Yet not every actor has a direct role in the process; the President, for example, has none. *See Hawke* v. *Smith*, 253 U.S. 221, 229-230 (1920); *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798). The people, too, have a defined role to play: Congress may direct that an amendment be ratified "by conventions of the people in each State." *Thornton*, 514 U.S. at 848-849 (Thomas, J., dissenting); *see*

Hawke, 253 U.S. at 227 (conventions are to "voice the will of the people" and be "representative of the people"). The people also influence the process indirectly by electing the federal and state legislators who hold the amendment power. Article V does not, however, assign "the people" a direct role in proposing amendments,[38] and the Tenth Amendment reserves to them no unstated power to amend, *see United States* v. *Sprague*, 282 U.S. 716, 733-734 (1931).

When a State, through voter initiative or otherwise, coerces Members of Congress into proposing amendments, it usurps a function Article V gives to others. In *Hawke*, the Court held that a state legislature's ratification of an amendment is not subject to popular referendum because the Framers did not intend for ratification to be "left to a vote of the people." 253 U.S. at 227. And in *Leser* v. *Garnett*, 258 U.S. 130 (1922), the Court held that "the function of a state legislature in ratifying a proposed amendment to the federal Constitution, *like the function of Congress in proposing the amendment*, * * * transcends any limitations sought to be imposed by the people of a State." *Id.* at 137 (emphasis added). *Hawke* and *Leser* thus stand for the proposition that voters may not themselves ratify or propose constitutional amendments, which are functions Article V gives to Congress, state legislatures, and ratifying conventions. *See Opinion of the Justices*, 160 N.E. 439, 440 (Mass. 1928).

Although Article V does not expressly provide that a state government may not use legal sanctions to coerce Members of Congress into proposing amendments, this is a "fair

---

[38] *See Dodge* v. *Woolsey*, 59 U.S. 331, 348 (1855) ("the people * * * have excluded themselves from any direct or immediate agency in making amendments to [the Constitution], and have directed that amendments should be made representatively for them"); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (" 'the people' seems to have been a term of art employed in select parts of the Constitution"); *cf.* U.S. Const. art. I, § 2, cl. 1 (Representatives are chosen "by the People").

inference or implication from Article V." *Dillon* v. *Gloss*, 256 U.S. 368, 375 (1921) (holding that amendments must be ratified in a reasonable time, even though Article V "says nothing about" that issue, *id.* at 371). Indeed, "[t]o argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Thornton*, 514 U.S. at 831. Just as voters plainly could not evade *Hawke* by instructing state legislators, through coercive sanctions, to vote on ratification of an amendment in accordance with a popular referendum, so a State may not in the same manner usurp Congress's role in proposing amendments. *Cf. Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935) (separation of powers requires that each branch be "free from the control or coercive influence, direct or indirect, of either of the others").[39]

Yet that is precisely what the Label Law seeks to do. As explained in detail above, its codified instructions and coercive labeling sanctions are a far cry from the "nonbinding, advisory referendum" considered by then-Justice Rehnquist in *Kimble* v. *Swackhamer*, 439 U.S. 1385, 1388 (1978). If States or voters favor an amendment they believe Congress is incapable of proposing, or unwilling to propose, Article V prescribes a procedure by which the States—through their legislatures—can compel Congress to call a convention for that purpose. *See The Federalist No. 85*, at 526 (Hamilton). The Label Law circumvents that constitutional process.

---

[39] *See also* Pet. App. A22; cases cited *supra* note 4; *AFL-CIO* v. *Eu*, 686 P.2d 609, 613 (Cal. 1984) (Article V "envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled * * * to vote in favor of a proposal they may believe unwise") (striking down voter initiative requiring state legislators to apply to Congress to convene a Convention or else suffer loss of salary); *State* v. *Waltermire*, 691 P.2d 826 (Mont. 1984) (invalidating similar initiative that would also have forced legislators to remain in session until they complied).

The Framers vested Congress and state legislatures, and only those bodies, with the power to propose amendments so as to "secur[e] deliberation and consideration before any change can be proposed." *Hawke*, 256 U.S. at 226; *see* Story, *supra*, § 1821 ("The great principle [of Article V] is to make the changes practicable, but not too easy; to secure due deliberation, and caution"). Under the Label Law, however, legislators are told—on pain of "threatened potential political death"—"to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people." *Donovan*, 931 S.W.2d at 127-128. Such a law contravenes the carefully crafted procedures of Article V.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JONATHAN S. FRANKLIN
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5766

ARTHUR A. BENSON II*
GREGG LOMBARDI
ARTHUR BENSON & ASSOCIATES
4006 Central Avenue
P.O. Box 119007
Kansas City, Missouri 64171
(816) 531-6565

* Counsel of Record

Counsel for Respondents

(13)

No. 99-929

Supreme Court, U.S.
FILED
SEP 13 2000
CLERK

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202)736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor

JAMES R. MCADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

* Counsel of Record

September 13, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
I. THE FRAMERS' REJECTION OF A PROPOSED CONSTITUTIONAL INSTRUCTION PROVISION IS IRRELEVANT BECAUSE ARTICLE VIII'S INSTRUCTION, UNLIKE THOSE IN THE PROPOSED PROVISION, IS NOT BINDING	2
II. ARTICLE VIII IS A VALID EXERCISE OF THE ELECTIONS CLAUSE, AND IT DOES NOT VIOLATE ARTICLE V OR PRINCIPLES OF FEDERALISM	4
III. THE BALLOT INFORMATION PROVIDED FOR IN ARTICLE VIII DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF CONGRESSIONAL CANDIDATES	11
A. The State Does Not Compel Speech By Providing Information On The Ballot	11
B. Even If Ballot Information Compelled Speech, The People's Interest In An Informed Electorate Outweighs Any Minor Effect The Information Has On A Candidate's Speech	13
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Buckley v. Valeo, 424 U.S. 1 (1976) 17
Burns v. United States, 501 U.S. 129 (1991) 2
Doe v. United States, 487 U.S. 201 (1988) 9
Foster v. Love, 522 U.S. 67 (1997) 8
Hawke v. Smith, 253 U.S. 221 (1920) 9
Hill v. Colorado, ___ U.S. ___, 120 S. Ct. 2480 (2000) 10
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 14
Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26 (1889) 9
Nixon v. Shrink Missouri Gov't PAC, ___ U.S. ___, 120 S. Ct. 897 (2000) 12, 14
Ohio ex rel. Davis v. Hildebrandt, 241 U.S. 565 (1916) 7, 9
Paul v. Davis, 424 U.S. 693 (1976) 12, 13
PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 15
Rankin v. McPherson, 483 U.S. 378 (1987) 15
Rice v. Cayetano, ___ U.S. ___, 120 S. Ct. 1044 (2000) 12
Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 13
Smiley v. Holm, 285 U.S. 355 (1932) 7, 9
Spallone v. United States, 493 U.S. 265 (1990) 10, 16
Tashjian v. Republican Party, 479 U.S. 208 (1986) 9, 11, 17
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 8, 13, 14
United States v. Johnson, 383 U.S. 169 (1966) 6
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 16

TABLE OF AUTHORITIES – continued

CONSTITUTIONAL PROVISIONS — Page

U.S. Const. art. I, § 2 (Qualifications Clause) 11
U.S. Const. art. I, § 3, cl. 3 (Qualifications Clause) 11
U.S. Const. art. I, § 4 (Elections Clause) 7, 8, 9, 10
U.S. Const. art. I, § 6 (Speech or Debate Clause) .. 6, 11
U.S. Const. art. V 4, 9, 11
U.S. Const. amend. I ..... *passim*
U.S. Const. amend. V 9
U.S. Const. amend. XIV 9
Mo. Const. art. III, § 49 7
Mo. Const. art. VIII, §§ 15-22 ..... *passim*

STATUTORY PROVISIONS

Mo. Rev. Stat. § 115.127 (Supp. 1999) 15
Mo. Rev. Stat. § 115.439 (1994) 15

SCHOLARLY AND OTHER AUTHORITIES

American Quotations, (Gorton Carruth & Eugene Ehrlich eds., 1992) 18
1 *Annals of Congress* (Joseph Gales ed., 1789) 2, 3
The Declaration of Independence (U.S. 1776) 17
The Federalist No. 22 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 4, 16
The Federalist No. 57 (James Madison) (Clinton Rossiter ed., 1961) 6
The Federalist No. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 3, 4
Official Manual of the State of Missouri 1997-1998 (Jim Grebing ed., 1997) 4
1 *Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826* (James Morton Smith ed., 1995) 18

TABLE OF AUTHORITIES – continued

Page

Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125 (1983) 2

IN THE

Supreme Court of the United States

No. 99-929

REBECCA MCDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

In their brief, Respondents demonstrate that they do not understand the essential import of the present case.[1] This is not a case about the right of the State to coerce Senators and Representatives on routine legislative matters. This case is about something much more fundamental: the "manner" in which the State conducts elections to promote the State electorate's strongly held preference to enact an amendment to the United States Constitution making representative democracy more responsive to the voters. Because the exercise of this right does not infringe on any constitutional rights or coerce

[1] Despite the fact that Respondents previously claimed that this case presented myriad constitutional concerns, Resp. Br. in Opp. 3 & 6, they now attempt to muddle the case by proposing a single, misleading question. Resp. Br. i. But this Court granted certiorari on three questions raising four distinct constitutional issues, and each of these questions must be resolved to determine the validity of the provisions of Article VIII as they relate to incumbent and non-incumbent candidates.

speech by candidates, Missouri's Article VIII is constitutional in its entirety. Accordingly, the attempt by Respondents, the United States and the Eighth Circuit to undermine Missouri's popularly adopted effort to enhance the quality of representation of federal officials should be rejected and the holding below reversed.

I. THE FRAMERS' REJECTION OF A PROPOSED CONSTITUTIONAL INSTRUCTION PROVISION IS IRRELEVANT BECAUSE ARTICLE VIII'S INSTRUCTION, UNLIKE THOSE IN THE PROPOSED PROVISION, IS NOT BINDING.

Notwithstanding that the court of appeals purported to find Article VIII in violation of four different constitutional provisions, Respondents devote significant attention (Resp. Br. 21-32) to an argument not grounded in any existing constitutional provision, i.e., that the Framers rejected a proposal to allow the States to instruct congressional representatives. Their argument is irrelevant both legally and factually. It is certainly strange to argue that the failure to adopt a particular constitutional amendment says anything about whether the exercise of a particular power by the people of a State is prohibited. *See* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125, 1133 (1983); *see also Burns v. United States*, 501 U.S. 129, 136 (1991) ("[n]ot every silence is pregnant") (alteration in original) (internal quotation marks omitted). Moreover there is no comparison between the constitutional provision the Framers declined to enact and Article VIII. At the time, instructions were formally binding. 1 *Annals of Congress* 763, 764 (Joseph Gales ed., 1789). A Representative who failed to act in accordance with their instructions would be deemed to have violated the Constitution itself. *Id.* at 764. Further, it was believed by many that any law passed in violation of the instructions of a majority of the Representatives would be of no force. *Id.* at 767.

In part, it was because of the legally binding nature of the proposed instruct provision that Madison opposed it. Madison believed that the people had no right "to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions." *Id.* at 766. Thus, as Respondents accurately contend, Madison was against binding instructions. Resp. Br. 22-23.

His opposition to binding instructions was not the only reason Madison opposed the instruct provision. He was also against it because he thought instructions, if non-binding, were redundant. To the extent the proposed instruct provision merely acknowledged the right of the people to instruct their Representatives, who were then free to disregard the instructions at their peril, such a provision was unnecessary. It was already provided for by the First Amendment.[2] 1 *Annals of Congress* at 766.

The instructions in Article VIII are the same as those that Madison already believed to be protected by the Constitution. They are not the type of binding instructions that he and the other Framers rejected. Missouri's instructions merely inform the State's congressional delegation of their constituents' wishes. The Senators and Representatives remain free to vote as they deem appropriate. In sum, Respondents' focus on the Framers' actions concerning congressional instructions provides no constitutionally textual basis for challenging Article VIII and does nothing to undermine the extensive history of the use of instructions set out in Petitioner's opening brief. Pet. Br. 10-17.

---

[2] Alexander Hamilton observed that in the Constitution "the people surrender nothing; and as they retain everything they have no need to particular reservations." *The Federalist No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Despite this, Respondents erroneously contend that the people's failure to include an unnecessary reservation of right precludes them from issuing non-binding instructions to their representatives. Resp. Br. 13 n.9.

II. ARTICLE VIII IS A VALID EXERCISE OF THE ELECTIONS CLAUSE, AND IT DOES NOT VIOLATE ARTICLE V OR PRINCIPLES OF FEDERALISM.

Article VIII was passed pursuant to the people's delegated power to regulate the manner of elections to promote democratic values. It was put on the ballot by the people of Missouri. It was voted on and approved by the people of Missouri.[3] And it was placed in the State Constitution by the people of Missouri. While the Elections Clause purports to grant federal power to the State Legislatures as Respondents contend, this point overlooks the basic fact that all power in our system emanates from the people. *The Federalist No. 22*, at 152 & *No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Here the people exercised an aspect of that power – the right to instruct their congressional delegation and the right to receive timely and accurate information about the behavior of federal candidates.

Apparently recognizing these inherent rights, Respondents and their *amici* fail to argue that the people lack the right to alter the form of their government pursuant to Article V by instructing their delegates to Congress. *See* Resp. Br. 47-50. Instead, Respondents argue that it is the State that will place the information on the ballot that allegedly coerces members

---

[3] In their briefs, Respondents and the Missouri League of Women Voters (LWV) raise a purely academic issue. They point out that "a majority of voters in a particular congressional district may *not* have voted in favor of term limits." LWV Br. 11; *see also* Resp. Br. 41. Thus, a candidate who votes against the people's term limits proposal "may be following the instruction of a majority of the voters in her district," but she will have a ballot notation placed after her name. LWV Br. 12; *see also* Resp. Br. 41. This issue is not presented here because Article VIII was passed by the voters in each of Missouri's Congressional Districts. *Official Manual of the State of Missouri 1997-1998*, at 103 & 591 (Jim Grebing ed., 1997). As a result, no candidate in Missouri will be faced with the choice hypothesized by the Respondents and LWV.

of Congress into proposing a constitutional amendment. Concededly, it is the Secretary of State who is actually responsible for physically placing the information on the ballot, but she acts solely at the behest of and as an agent for the electorate. She places ballot information next to an incumbent candidate's name if, and only if, the candidate meets one of the people's criteria specifically outlined in Article VIII, Section 17(2)(a-g);[4] and next to a non-incumbent's name if, and only if, the candidate refuses to take the pledge offered by the people as set forth in Article VIII, Section 18. In either case, the Secretary has no discretion, and her duties are purely ministerial.

Further, the only role played by the judiciary is to ensure that the Secretary of State exercises no discretion, and that she simply performs the duties assigned to her by the citizenry. If either an elector or an elected official believes that the Secretary either improperly placed or improperly failed to place a ballot notation, then he or she may challenge the matter before the Missouri Supreme Court.[5] And the

---

[4] The United States apparently misunderstands these provisions of the Missouri Constitution. In its brief, it claims that "[a]n incumbent candidate could scarcely make speeches in Congress against the term limits amendment and escape the ballot label, since the Amendments instruct Members to use *all* of their delegated powers to pass the amendment." U.S. Br. 20 (emphasis in original). While the instruct provision of Article VIII does direct elected officials to use all of their powers; it is separate from the inform provision. Under the inform provision, a ballot label will only be placed after an official's name if he fails to engage in the eight specified behaviors described in Section 17(2). And Section 17(2) does not in anyway inhibit an elected official's right to speak freely. Thus, an elected official who merely speaks out against term limits escapes the imposition of the ballot notation. Unfortunately, the failure to differentiate between the instruct and the inform provisions of Article VIII is a common mistake. It was made by the district court, the court of appeals, and now by the United States itself.

[5] The United States claims this procedure will require Senators and Representatives to "justify" their actions to the judiciary, and thus it runs

court will base its decision only on the factors contained in Sections 17(2) and 18. No impermissible executive or judicial action is taken;[6] these government officials simply assure that the electorate has before it the accurate information requested.

Respondents seem to suggest that because federal legislators have national responsibilities exceeding the geographical boundaries of their districts or states, that legislators enjoy autonomy from their constituents. Resp. Br. 33. Federal legislators, once elected, are free to ignore their constituents' wishes during their term and this autonomy continues unabated under Article VIII. But this autonomy ends when the legislator seeks re-election. At that moment, autonomy yields to accountability. *See The Federalist No. 57*, at 352 (James Madison) (The Constitution's protections "would be found very insufficient without the restraint of frequent elections. Hence . . . the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people."). All Missouri voters have done is decide that, while making their political decisions, they want to know whether their autonomous legislators have behaved in a fashion inconsistent with their constituents' wishes. Such knowledge does not violate principles of federalism and is entirely consistent with the Elections Clause.

---

afoul of the Speech or Debate Clause. U.S. Br. 24. But the United States misunderstands Missouri's procedure. If an elected official failed to perform the duties outlined in Mo. Const. art. VIII, § 17(2)(a)-(g), no amount of justification or rationalization will prevent the placement of ballot information after his name. And if an elected official actually performs the duties cited in Article VIII, no amount of professed or apparent animus to the people's proposed Term Limits Amendment will result in the placement of ballot information after his name.

[6] Because Article VIII does not involve any impermissible action by either the executive or judicial branch, it does not violate the Speech or Debate Clause. *United States v. Johnson*, 383 U.S. 169, 179 (1966).

Respondents are correct in noting that, pursuant to the Elections Clause, only the "State Legislature" may regulate the "Times, Places and Manners of holding Elections." Resp. Br. 12 (quoting U.S. Const. art. I, § 4, cl. 1). Thus, the State may pass laws "governing just 'the *mechanics* of congressional elections.'" Resp. Br. 13 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)) (emphasis in Resp. Br.). Though Respondents properly acknowledge the grant of power, their argument that the delegation is inadequate to support Article VIII fails because they do not appreciate the breadth of the grant in Article I, Section 4.

Initially, seizing on the "State Legislature" language of the Elections Clause, Respondents contend that Article VIII is invalid because it was passed by popular referendum and not by a State Legislature. Resp. Br. 12-13 n.8. They distinguish *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), in which this Court recognized that an elections law passed by the people and not the State Legislature was valid, by noting that Congress, by statute, had there expressly approved use of the referendum process. Thus, Respondents argue that, in the absence of Congressional action, only a State Legislature may pass a law impacting federal elections. This argument is without legal merit. As this Court has explained:

> It is manifest that the Congress had no power to alter Article 1, section 4, and that the Act of 1911, in its reference to state laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision. And it was because of the authority of the State to determine what should constitute its legislative process . . .

under the Elections Clause that the regulation in *Davis* was sustained. *Smiley v. Holm*, 285 U.S. 355, 372 (1932). In Missouri the people are included in the legislative process. *See* Mo. Const. art. III, § 49. And as this Court noted, that is the State's right. *Smiley*, 285 U.S. at 372-73. Therefore,

Article VIII is not invalid simply because it was passed by the people.

Nor did the people exceed the authority granted by Article I, Section 4. As mentioned, the people may regulate the "manner" and "mechanics" of elections. U.S. Const. art. I, § 4, cl. 1; *Foster v. Love*, 522 U.S. 67, 69 (1997). This is a "broad power." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986)). Moreover, there is no reason for the Court to artificially restrict the authority of the State because Article I, Section 4 contains its own safety valve by which Congress can override any election procedure the State imposes. Thus, the structure of Article I, Section 4 indicates that the States were granted extensive power in the election process. And Article VIII falls well within the sweep of that power.

Article VIII is merely a regulation on the manner and mechanics of elections. It regulates what information appears on the ballot. Thus, it is similar in kind to other ballot-oriented regulations, such as the placement of party labels and nicknames on the ballot. And this Court has never found the placement of these items on the ballot to be unconstitutional.[7]

In fact, in rejecting an assertion that party labels mislead voters, the Court stated that "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candi-

---

[7] Respondents contend that, pursuant to the Court's holding in *Timmons*, the Elections Clause "plainly forbids" the people from communicating to themselves on their own ballot. Resp. Br. 19. This is a wholly incorrect reading of *Timmons*. In *Timmons*, the Court held that it was constitutionally sound for a State to curtail a political party's use of the ballot as a communicative tool. But the fact that a State *may* curtail an activity does not remotely suggest the conclusion that a State *must* curtail an activity. And, the *Timmons* Court did not issue a mandate requiring States to stamp out any attempt to use the ballot as a communicative tool.

dates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986). Article VIII does nothing more. And despite the fact they bore the burden of demonstrating that Article VIII was not a regulation of the manner of elections, Respondents offered no evidence to the District Court to the contrary. J.A. 27-28.

Instead, in a new attempt to rebut Article VIII's validity, Respondents try to incorporate into Article I, Section 4, the definition of time, place, and manner utilized by this Court in its First Amendment jurisprudence. Resp. Br. 13-14 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). This Court has never used the First Amendment's definition of time, place and manner when interpreting the Elections Clause. Nor is there any indication that the Court even considered the Elections Clause when it developed its First Amendment content-neutrality doctrine. The mere coincidence of language proves nothing. The Constitution is replete with examples of the same language being infused with different meanings. To use an example relevant to the present action, this Court has interpreted State Legislatures to mean only State Legislatures for the purposes of Article V, *Hawke v. Smith*, 253 U.S. 221, 227 (1920), while it has interpreted State Legislature to include actions by the people themselves for the purposes of the Elections Clause.[8] *Davis*, 241 U.S. at 568-569; *Smiley*, 285 U.S. at 372.

Like all forms of interpretation, the Court must consider context. Here the Constitution granted the States broad power to regulate the process of elections, which inherently includes

---

[8] Similarly, for the purposes of the Due Process Clause, this Court has found the word "person" to include corporations, *Minneapolis & St. Louis Railway v. Beckwith*, 129 U.S. 26, 28 (1889); but it does not count corporations as persons for the purposes of the Fifth Amendment's Self-Incrimination Clause. *Doe v. United States*, 487 U.S. 201, 206 (1988).

the content of the ballot itself. The Constitution then delegates to Congress the power to check the State if the former decides in its unfettered discretion that certain ballot forms are inappropriate. In that context, there is no room for additional judicial oversight based on content. Thus, there is no reason to incorporate concepts derived from a very different constitutional context to restrict the State's otherwise sweeping power. Accordingly, the use of similar language is dispositive of nothing. And in the absence of any evidence that this Court or the Framers ever intended to utilize the First Amendment definition of time, place and manner when interpreting the Elections Clause, no purpose is served by importing alien doctrines designed for different purposes into Article I, Section 4.

But even if the Court were to look to First Amendment principles in defining Article I, Section 4, Article VIII would still pass constitutional muster. Respondents and their *amici* allege that Article VIII is not content neutral because it would require the State to look at the content of a candidate's speech. But a statute may still be content neutral even though it requires an analysis of the content of the speaker's speech. *Hill v. Colorado*, ___ U.S. ___, 120 S. Ct. 2480, 2492 (2000). If the analysis is brief and designed to simply determine the applicability of the statute, then the statute is content neutral. That is all that occurs under Article VIII; the Secretary of State reviews the alleged "speech" of Congressional candidates[9] to determine whether ballot information is applicable. This activity does not take Article VIII out of the content-neutral rubric.

---

[9] As Petitioner demonstrated in her initial brief, Article VIII does not even regulate speech. Pet. Br. 32-34. Instead, it is a simple comment on behavior. *See, e.g., Spallone v. United States*, 493 U.S. 265, 302-03 n.12 (1990) (Brennan, J., dissenting) ("[w]hile the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance;" and thus not protected by the First Amendment).

III. THE BALLOT INFORMATION PROVIDED FOR IN ARTICLE VIII DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF CONGRESSIONAL CANDIDATES.

Article VIII does not run afoul of the First Amendment; it does not compel speech, it does not even regulate speech. To the extent it affects speech at all, the effect is minimal and is outweighed by the citizens' interest in passing Article VIII. Despite these facts, Respondents argue that the people violate a candidate's First Amendment rights by commenting on her actions or inactions.[10]

A. The State Does Not Compel Speech By Providing Information On The Ballot.

Apparently recognizing that Article VIII does not include any specific fine or criminal penalty, Respondents argue that Article VIII's ballot information compels speech because it threatens a politician's "livelihood." Resp. Br. 18.[11] But it is

---

[10] Respondents contend that the ballot information provisions of Article VIII violate only their free speech rights. Thus, Respondents are not challenging Article VIII, Sections 15, 16, and 17(1) on First Amendment grounds. This same observation would appear to apply to Respondents' Speech or Debate and Qualifications Clauses claims. It is unclear whether Respondents continue to assert that these sections of Article VIII violate federal Article V, or whether they limit their Article V attack to Sections 17(2), 18 and 19 of Missouri's Article VIII.

[11] Similarly recognizing that the State has a strong interest in ensuring an informed electorate, *see Tashjian*, 479 U.S. at 220, Respondents also attack the quality of the information provided by Article VIII – labeling it "pejorative," Resp. Br. 34, and "misleading," Resp. Br. *passim* (dissecting the information to focus on only one of its parts). But this labeling is not analysis and the language the people employed is undeniably truthful. The non-incumbent candidate either took the pledge or did not. The incumbent candidate either engaged in the legislative behaviors about which the public had an interest or not, and if not, thereby failed to follow the voters' instructions. There is nothing misleading.

not the information that threatens a politician's livelihood; it is, if anything, the politician's failure to respond to the will of his constituency that has such an impact. The inclusion of ballot information will not prevent the candidate from appearing on the ballot, nor will it bar the candidate from service in Congress. The ballot information simply educates the voters who then put the information to whatever use they see fit. If any negative action is taken as a result of that education, it will be taken by the voters themselves.

This distinction between the State actually imposing the penalty, and the State providing information that may result in a penalty imposed by others is a crucial one. In *Paul v. Davis*, 424 U.S. 693 (1976), this Court recognized that the Constitution affords people little protection from such privately imposed penalties. In *Paul*, a government official passed out fliers branding Davis "an active shoplifter." As a result, Davis claimed he experienced difficulty in gaining employment, i.e., his livelihood was damaged. The Court concluded that Davis had no claim. The Court stated that:

Though Article VIII's two informational sentences are not distinguished by Respondents in their analysis, the sentence for non-incumbents is neutral and the sentence for incumbents cannot be accurately labeled pejorative because of one negative phrase. Voters will not see "disregarded voters' instructions" in a vacuum; they are smarter than that. *See Rice v. Cayetano*, ___ U.S. ___, 120 S. Ct. 1044, 1060 (2000) (It is presumed that citizens will "cast a principled vote."). Rather, the electorate will see that the object of each informational sentence is "term limits." This information is provided equally to supporters and opponents of the term limits amendment to act on or ignore.

In any event, the term "pejorative" is unanalytical. It cannot substitute for coercion without proof that the ballot information in fact coerces speech. And Respondents' two-page summary judgment motion does not remotely prove that there is an unacceptable impact on speech. *See, e.g., Nixon v. Shrink Missouri Gov't PAC*, ___ U.S. ___, 120 S. Ct. 897, 907-08 (2000) (mere conjecture is inadequate to carry a First Amendment burden).

> "It may be assumed that the listing is hurtful to their prestige, reputation and earning power. . . . This designation, however, does not prohibit any business of the [individual], subject [him] to any punishment or deprive [him] of liberty of speech or other freedom."

Id. at 704 (alterations and omission in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 202 (1951) (Reed, J., dissenting)). To the extent Davis suffered any penalty, it was "applied by public disapproval, not by law." *Paul*, 424 U.S. at 704 (quoting *McGrath*, 341 U.S. at 183-84 (Jackson, J., concurring)). As a result, Davis had no claim against the government for being labeled an "active shoplifter."

Similarly, Article VIII does not give rise to a compelled speech claim.[12] The inclusion of ballot information does not bar the candidate from service in Congress. Voters still make the decision, among all the available choices, who will serve in Congress; they simply make that electoral decision with the benefit of the information they requested. And, as the Court recognized in *Paul*, neither Respondents, nor anyone else, has the constitutional right to be free from the public's sentiment.

B. Even If Ballot Information Compelled Speech, The People's Interest In An Informed Electorate Outweighs Any Minor Effect The Information Has On A Candidate's Speech.

To the extent it regulates speech at all, the ballot information should not be subjected to this Court's strict scrutiny test. As the Court made clear in *Timmons*, there is no one test

---

[12] It is interesting to note that in a compelled speech case, where the government actually attempted to compel speech by a private party, the Court noted that "the State may itself publish" the information it wanted the public to have. *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988). Respondents seemingly reject this proposition.

for determining whether an election law affecting speech violates the First Amendment. 520 U.S. at 358-59 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). *See also Nixon*, ___ U.S. ___, 120 S. Ct. at 903 (declining to apply a label that encompasses "[p]recision about the relative rigor of the standard" to be applied). An application of strict scrutiny is particularly inappropriate "where constitutionally protected interests lie on both sides of the legal equation." *Nixon*, 120 S. Ct. at 911 (Breyer, J., concurring). Though there is not a specific test, the essence of the analysis is the balancing of the burden the election law places on the plaintiff's rights against the nature of the government's interests. *Timmons*, 520 U.S. at 358-59.

Despite the Court's call for the application of a balancing test in the area of elections law, Respondents claim that Article VIII should be subjected to strict scrutiny. They rely on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), for this assertion, but this reliance is misplaced. In *McIntyre*, the Court concluded that because the statute at issue, a ban on anonymous pamphleting, did not regulate "the mechanics of the electoral process," the "ordinary litigation" test for elections cases did not apply. *Id.* at 345.

Unlike the pamphleting ban at issue in *McIntryre*, Article VIII regulates the mechanics of elections. It regulates what information will appear on the ballot. Thus, it is similar in kind to other ballot-oriented regulations, such as the placement of party labels and nicknames on the ballot.[13] As a result, Article VIII is subject to this Court's balancing test.

---

[13] Respondents argue that ballot information provisions of Article VIII are much different from the placement of party labels on the ballot. Resp. Br. 14-15 n.12. They contend that by placing party labels on the ballot, the State is communicating nothing. It is doubtful that Democrats and Republican candidates in the South believed this in the early part of the Twentieth Century. Moreover Respondents' other arguments undercut this point. Respondents argue that, by placing ballot information concerning term limits on the ballot, the State is communicating that this is an

Article VIII, if it places any burden at all, places only a minimal burden on the free speech rights of candidates for Congress. Candidates can speak as they please. The only two things that will prompt the people to place ballot information next to a candidate's name are: the incumbent candidate's behavior in Congress and the non-incumbent candidate's failure to take the pledge. Thus, the people comment on only the narrowest range of activities, and the magnitude of any possible restriction on speech created by Article VIII is, at most, small.[14]

Further, as to incumbent candidates the restriction is lessened still by the fact that they, as government employees, do not enjoy complete First Amendment protection for their actions taken within the scope of employment. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 390 (1987) ("The burden

---

important issue worth basing a vote on. Resp. Br. 15. This argument carries equal weight as to party labels. By placing party labels on the ballot, the State is communicating that party affiliation, or lack thereof, is an important matter on which a vote should be based. In fact, party affiliation is considered such an important consideration, Missouri law allows voters to use it as the sole basis for casting a ballot. *See* Mo. Rev. Stat. § 115.439.1(1) (1994) (allowing voters to vote a straight, party-line ticket). Thus, if Respondents' arguments are true, then the ballot information of Article VIII is no more a violation of the Constitution than party labels.

[14] Further, as Petitioner demonstrated in their initial brief, Pet. Br. 37, this restriction is further narrowed by the candidate's opportunity to disassociate herself from the ballot notation. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). Respondents claim that candidates are deprived of the opportunity to disassociate themselves because the voters will not receive the message until the crucial moment of voting. Resp. Br. 42-43. This argument neglects Missouri law. In the weeks prior to the election, a sample ballot is published in the various newspapers of Missouri. Mo. Rev. Stat. § 115.127.2 (Supp. 1999). And if an area is not serviced by a newspaper, then a sample ballot will be mailed to the voter's homes. *Id.* § 115.127.4 (Supp. 1999). Therefore, voters generally will know the ballot's contents before the election. And as the voters will be aware of the contents of the ballot, candidates will have an opportunity to disassociate themselves from any information contained thereon.

of caution employees bear with respect to the words they speak will vary with the extent of authority and accountability the employee's role entails."). This Court has long recognized the right of the government, within limits, to constrain the speech of its employees. For example, it is well within the rights of the Department of Justice to require its attorneys to take positions with which they disagree, and to fire those lawyers who refuse to do so. Such control is necessary to ensure the proper functioning of government. Similarly, an incumbent candidate's employers, his or her constituents, enjoy some measure of control over the content of his governmental "speech." This control helps explain Justice Brennan's dissent in *Spallone*, 493 U.S. 265 at 302-03 n.12 (1990) (Brennan, J., dissenting). He recognized that though "the act of publicly voting on legislation arguably contain[ed] a communicative element, the act is quintessentially one of governance" and thus not protected by the First Amendment.

On the other side of the balance, the people have a strong interest in preserving Article VIII. By passing Article VIII, the people of Missouri announced to the world that they wanted the Constitution amended. This voice of the people must be heard to ensure the integrity of our government because "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 843 (1995) (Kennedy, J., concurring) (internal quotation marks omitted) (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 513 (1939) (opinion of Roberts, J., joined by Black, J., and joined in relevant part by Hughes, C.J.)). For a government is only valid if it responds to the will of the people. *The Federalist No. 22*, at 152 (Alexander Hamilton). By passing Article VIII, the people simply voiced their will. And preserving the people's voice in government is not only an important interest; it is a paramount interest.

Beyond the people's right to provide information, they also possess a right to receive information vital to their electoral choices. There "can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Tashjian*, 479 U.S. at 220 (internal quotation marks omitted). This assertion is true because, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

The right to provide and receive information are critically related to the people's involvement in government. They provide the people with a real opportunity to engage in the "[d]iscussion of public issues and debate on the qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. No interest could be more compelling. Therefore, the people's interest in passing Article VIII outweighs the minimal effect Article VIII may have on the free speech rights of candidates for Congress.

* * * * * * * * *

In the final analysis, all of the Respondents' and the United States' objections boil down to one concept: the people cannot be trusted to govern themselves. In fact, an informed electorate "undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." Resp. Br. 46. The people are simply too ill-tempered, uneducated and volatile to be entrusted with facts that allow them to make informed choices. Fortunately, our Framers did not adhere to this pseudo-monarchist principle. Instead, they recognized that it was self-evident "[t]hat whenever any Form of Government becomes destructive of these ends [life, liberty and the pursuit of happiness] *it is the Right of the People to alter or to abolish it*." *The Declaration*

of Independence para. 2 (1776) (emphasis added). In fact, Thomas Jefferson knew of:

> no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

American Quotations, 179 (Gorton Carruth & Eugene Ehrlich eds., 1992). It is on the people's "good sense we may rely with the most security for the preservation of a due degree of liberty." 1 *Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826*, at 514 (James Morton Smith ed., 1995).

That is what the people of Missouri sought by passing Article VIII: education and information. And by its opinion, the Eighth Circuit denied the people the information they took extraordinary electoral steps to secure and deserve to receive. It is now up to this Court to return to the people their voice in government, and grant them the information they regard as vital in attempting to secure a more representative democracy for all people.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202)736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor

JAMES R. MCADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Counsel for Petitioner

September 13, 2000 * Counsel of Record

Supreme Court, U.S.
FILED
AUG 14 2000
CLERK

(12)

No. 99-929

In the Supreme Court of the United States

REBECCA MCDOWELL COOK, PETITIONER

v.

DON GRALIKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
DOUGLAS N. LETTER
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

At issue in this case are provisions of the Missouri Constitution (the Missouri Amendments) that (a) instruct Members of Congress elected from Missouri to exercise their legislative powers in favor of a proposed amendment to the United States Constitution that would limit the terms of Members of Congress, (b) require the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" to appear on the ballot next to the name of any incumbent candidate for Congress who is found by the Missouri Secretary of State to have failed to follow that instruction, and (c) require the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" to appear on the ballot next to the name of any non-incumbent candidate for Congress who declines to pledge to act in accordance with the instruction if elected.

The United States will address the following questions:

1. Whether the Missouri Amendments exceed the State's power to regulate federal elections under the Elections Clause, U.S. Const. Art. I, § 4, Cl. 1, because they are inconsistent with the fundamental constitutional structure of the national government.
2. Whether the Missouri Amendments violate the First Amendment.
3. Whether the Missouri Amendments violate the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
I. The Missouri Amendments are inconsistent with fundamental constitutional principles defining and limiting the authority of the States under the Elections Clause to regulate federal elections	8
II. The Missouri Amendments violate the First Amendment	15
III. The Missouri Amendments violate the Speech or Debate Clause	21
IV. The State's historical examples of instructions to legislators and ballot notations do not salvage the Missouri Amendments	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

American Party of Tex. v. *White*, 415 U.S. 767 (1974)	18
Anderson v. *Celebrezze*, 460 U.S. 780 (1983)	10, 16, 18, 29
Anderson v. *Martin*, 375 U.S. 399 (1964)	11
Board of Comm'rs v. *Umbehr*, 518 U.S. 668 (1996)	17, 18, 20
Board of Regents of the Univ. of Wis. Sys. v. *Southworth*, 120 S. Ct. 1346 (2000)	10
Burdick v. *Takushi*, 504 U.S. 428 (1992)	9, 10, 16, 29
Burson v. *Freeman*, 504 U.S. 191 (1992)	9
Coalition to End the Permanent Congress v. *Runyon*, 979 F.2d 219 (D.C. Cir. 1992)	10
Crandall v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868)	14

Cases—Continued: Page

Doe v. *McMillan*, 412 U.S. 306 (1973) 22, 23
Dombrowski v. *Eastland*, 387 U.S. 82 (1967) 22
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975) 22
Hurley v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) 17
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979) 22
Illinois State Bd. of Elections v. *Socialist Workers Party*, 440 U.S. 173 (1979) 9
Jenness v. *Fortson*, 403 U.S. 431 (1971) 18
Kilbourn v. *Thompson*, 103 U.S. 168 (1881) 22, 23
McLain v. *Meier*, 637 F.2d 1159 (8th Cir. 1980) 10
Meese v. *Keene*, 481 U.S. 465 (1987) 10
Munro v. *Socialist Workers Party*, 479 U.S. 189 (1986) 18
NEA v. *Finley*, 524 U.S. 569 (1998) 18
Norman v. *Reed*, 502 U.S. 279 (1992) 20
Ray v. *Blair*, 343 U.S. 214 (1952) 28
Rosario v. *Rockefeller*, 410 U.S. 752 (1973) 29
Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 10, 17-18
Saenz v. *Roe*, 526 U.S. 489 (1999) 14
Sangmeister v. *Woodard*, 565 F.2d 460 (7th Cir. 1977), cert. denied, 435 U.S. 939 (1978) 10
Spallone v. *United States*, 493 U.S. 265 (1990) 19
State ex rel. McCue v. *Blaisdell*, 118 N.W. 141 (N.D 1908) 28
Storer v. *Brown*, 415 U.S. 724 (1974) 16
Tashjian v. *Republican Party of Conn.*, 479 U.S. 208 (1986) 16
Timmons v. *Twin Cities Area New Party*, 520 U.S. 351 (1997) 10
U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 8, 10, 11, 13 14, 15, 16, 27

Cases—Continued: Page

United States v. *Brewster*, 408 U.S. 501 (1972) 22, 23
United States v. *Helstoski*, 442 U.S. 477 (1979) 22, 23

Constitutions:

U.S. Const.:
Art. I:
§ 2:
Cl. 1 9
Cl. 2 ..... 5, 15, 27
§ 3, Cl. 3 5
§ 4, Cl. 1 (Elections Clause) 1, 5, 8, 9, 16
§ 6, Cl. 1 (Speech or Debate Clause) 1, 5, 7, 21, 22, 24, 25, 26, 27
Art. V 5, 15
Amend. I 1, 5, 6, 9, 15 16, 17, 19, 20, 29
Amend. XII 28
Amend. XIV 16
Equal Protection Clause 16
Amend. XV 9
Amend. XVII 13, 26, 27
§ 1 9
Amend. XIX 9
Amend. XXIV 9
Amend. XXVI 9
Mo. Const. Art. VIII:
§ 15 2
§ 16 ..... 2, 3
§ 17(1) 2, 20
§ 17(2) 3, 24
§ 17(2)(a) 19
§ 17(2)(a)-(h) 3
§ 17(2)(c) 19, 24
§ 17(2)(e) 24
§ 17(2)(g) 19
§ 18(1) 3

	Page
Constitution—Continued:	
§ 18(3)	3, 19
§ 19(1)	3
§ 19(2)	23, 24
§ 19(3)	4
§ 19(5)	4, 16, 24
§ 19(6)	4, 16
Miscellaneous:	
The Federalist (Clinton Rossiter ed., 1961):	
No. 15 (Hamilton)	12
No. 52 (Madison)	12
No. 57 (Madison)	15
No. 59 (Hamilton)	8, 12
1 George H. Haynes, *The Senate of the United States: Its History and Practice* (1938)	28
1 *The Records of the Federal Convention of 1787* (Max Frand ed., rev. ed. 1966)	12

In the Supreme Court of the United States

REBECCA MCDOWELL COOK, PETITIONER

v.

DON GRALIKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves an attempt by the State of Missouri to require that Members of Congress elected from that State deploy their legislative authority in accordance with instructions from the State on an issue relating to the structure and governance of the federal union. The Amendments to the Missouri Constitution under review raise serious questions about the fundamental constitutional structure of the national government. Those Amendments also raise serious questions about the authority of the States under the Elections Clause, the First Amendment, and the Speech or Debate Clause to influence the outcome of federal elections. The United States has a substantial interest in the resolution of those questions.

STATEMENT

1. This case involves a constitutional challenge to amendments to the Missouri Constitution (hereinafter Missouri Amendments or Amendments) adopted by the voters of that State in a ballot initiative in 1996. The Missouri Amendments declare the "intention" of the "people of Missouri" that a specific amendment to the United States Constitution be adopted. Mo. Const. Art. VIII, § 15. The Amendments then set forth the text of that proposed constitutional amendment, which would limit Members of the United States House of Representatives to three terms and United States Senators to two terms, and would empower the several States to adopt longer or shorter limits for their congressional delegations. *Id.* Art. VIII, § 16.

The Amendments "instruct" each Senator and Representative elected from Missouri to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in Section 16]." Mo. Const. Art. VIII, § 17(1). Pursuant to that instruction, a Member of Congress from Missouri must, if an appropriate occasion arises, perform one or more specified legislative acts in support of the proposed term-limits amendment.[1] If a Senator or

[1] In particular, a Member of Congress from Missouri must (a) vote in favor of the proposed amendment if and when it is brought to a vote, (b) second the proposed amendment if a necessary second is lacking at any congressional proceeding, (c) propose or otherwise bring the proposed amendment to a vote of the pertinent legislative body if no other legislator does so, (d) vote in favor of bringing the proposed amendment to a vote before any committee or subcommittee on which he or she serves, (e) reject any attempt to delay or table a vote on the proposed amendment, (f) vote against any proposed term-limits amendment that would establish longer term limits than Missouri's proposed amendment, (g) not sponsor any proposed amendment or law that would increase term limits beyond those in Missouri's proposed amendment, and (h) ensure that all votes on

Representative from Missouri fails to perform such a legislative act on the appropriate occasion, then the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" must be printed adjacent to that Member's name on the next primary and general election ballots. *Id.* Art. VIII, § 17(2).

Non-incumbent candidates for Congress from Missouri are "given an opportunity" to take a specific pledge indicating support for the proposed term-limits amendment. Mo. Const. Art. VIII, § 18(1). The pledge states: "I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." *Id.* Art. VIII, § 18(3). Thus, non-incumbent candidates must undertake that, if elected, they will perform specific legislative acts in support of the term-limits amendment. If a non-incumbent candidate declines to take the pledge, then the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" must be printed next to his name on the primary and general election ballots. *Id.* Art. VIII, § 18(1). That label must be affixed even if the non-incumbent candidate supports some variant of term limits other than the one set forth in Section 16.

The Secretary of State of Missouri (Secretary) is assigned responsibility for determining whether candidates shall have the specified labels placed next to their names on the ballots. Mo. Const. Art. VIII, § 19(1). For incumbents, the Secretary must make that determination "based upon each member of Congress's action during their current term of office and any action taken in any concluded term, if such action was taken

term limits are recorded and made publicly available. Mo. Const. Art. VIII, § 17(2)(a)-(h).

after the determination and declaration was made by the Secretary of State in a previous election." *Id.* Art. VIII, § 19(3).

The Secretary's determinations with respect to both incumbents and non-incumbents may be appealed to the Missouri Supreme Court, either by a candidate (if the Secretary determines that the candidate has not complied with the provisions and a label should therefore be placed next to the candidate's name on the ballot) or by any elector (if the Secretary determines that the candidate has complied and a label is therefore not required). Mo. Const. Art. VIII, § 19(5)-(6). If the Secretary determines that a ballot label is required for a candidate and the candidate appeals to the Missouri Supreme Court, the candidate has the burden of demonstrating by clear and convincing evidence that the label should not be placed next to his name on the ballot. *Id.* Art. VIII, § 19(6). If the Secretary determines that the ballot label is not required for a candidate and an elector appeals, the Secretary has the burden of demonstrating by clear and convincing evidence that the label should not be placed next to the candidate's name. *Id.* Art. VIII, § 19(5). In effect, therefore, a label must be placed next to a candidate's name unless there is clear and convincing evidence that the candidate has performed, on an appropriate occasion, one or more specific acts in Congress to support the term-limits amendment (in the case of an incumbent) or has promised to do so if elected (in the case of a non-incumbent).

2. On December 11, 1996, respondent Gralike, a resident and voter in Missouri's Third Congressional District and a candidate for House of Representatives in 1996 and 1998, filed this lawsuit in district court, contending that the

Missouri Amendments are unconstitutional.[2] The district court ruled the Amendments invalid on three grounds: (a) they impose qualifications for service in Congress beyond those enumerated in the Qualifications Clauses of Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3 (see Pet. App. A32, A42-A46); (b) they infringe the First Amendment rights of candidates for Congress by compelling them to take a position on a matter of public concern (see *id.* at A32, A47-A52); and (c) they coerce legislators into voting for the proposed term-limits amendment in accordance with the ballot initiative's instruction, and thereby impermissibly involve the people in the formal process of amendment of the Constitution, in violation of Article V (see *id.* at A32, A61).

The court of appeals affirmed. Pet. App. A1-A26. The court held the Missouri Amendments invalid on four grounds. Like the district court, the court of appeals concluded that the Amendments violate the First Amendment (see *id.* at A8-A14), the Qualifications Clauses (see *id.* at A15-A19), and Article V (see *id.* at A15-A19). In addition, the court ruled (*id.* at A14-A15) that the Amendments violate the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, reasoning that they "establish[] a regime in which a state officer * * * is permitted to judge and punish members of Congress for their legislative actions or positions." Pet. App. A15.

SUMMARY OF ARGUMENT

I. The Missouri Amendments exceed the States' power to operate federal elections, as defined and limited by the Elections Clause. The Elections Clause permits the States only to make nondiscriminatory and reasonable procedural

---

[2] While this case was pending on appeal, respondent Mike Harman, a candidate for Congress in Missouri's Seventh District in 1998, intervened as appellee to challenge the Amendments. Resp. Br. in Opp. 5.

regulations of federal elections to ensure their orderliness and integrity, not to use their power over the ballot to influence the outcome of elections based on substantive state policy. The States also may not use their power over federal elections in a manner inconsistent with fundamental constitutional principles governing the structure of the national government. The Amendments are inconsistent with such principles, in three respects. First, the Amendments undermine principles of representative democracy inherent in the national government by manipulating the ballot, over which the State has monopoly power, to send a powerful signal to voters at the moment of choosing that a particular candidate has not accepted the people's will and does not deserve their trust and confidence. Second, by interjecting the State's position on the issue of term limits into the voting booth, the Amendments interfere with the direct connection between the people of the State and their federal representatives, a relation the Framers deemed essential to the success of the union. Finally, by seeking to require that federal legislators vote in accordance with a particular state policy, the Amendments undermine federal legislators' obligation to act in the national interest and on behalf of all the citizens of the United States, not just residents of their own State.

II. The Amendments violate the First Amendment rights of candidates for federal office. The Amendments require, as a condition of obtaining a ballot position unimpaired by a pejorative state label, that a candidate demonstrate adherence to the state policy of support for the proposed term-limits amendment. The Amendments therefore operate as an unconstitutional condition on ballot access, requiring candidates to express a particular viewpoint on a particular subject matter in order to obtain a benefit from the State. Because the condition and the ballot label are viewpoint-based, and because they significantly impair a noncompliant candidate's ability to present himself to voters

for serious consideration on an equal footing, the Amendments require strict scrutiny. The Amendments are not, however, narrowly tailored to promote a compelling state interest. Although the State argues that the labels promote voter education, the State could advance that interest without manipulating the ballot, and the labels are misleading in any event.

III. The Amendments also violate the Speech or Debate Clause. The Speech or Debate Clause prohibits the government from imposing a burden on a Member of Congress based on evidence of the Member's legislative activity. The Clause also prohibits, in litigation affecting the Member's personal interest, the introduction into evidence of the Member's votes and other legislative activity. The Amendments contravene these principles. The Amendments require the Secretary of State to examine federal legislators' voting records and other legislative activity to determine whether the Member will be assigned a pejorative ballot label. The Amendments also require that a Member demonstrate and justify his legislative record to a state official by clear and convincing evidence in order to avoid such a ballot label. The Clause does not permit state officials to require that Members of Congress give evidence of their legislative activity in order to avoid a state-imposed burden.

IV. Various historical examples of instructions to legislators and ballot notations put forward by the State do not support the constitutionality of the Amendments. None of those examples involved a state-imposed condition that a candidate adopt a particular viewpoint on a particular substantive issue in order to obtain unimpaired access to the ballot in a popular election. None of them, therefore, is apposite to analysis of the Missouri Amendments.

ARGUMENT

I. THE MISSOURI AMENDMENTS ARE INCONSISTENT WITH FUNDAMENTAL CONSTITUTIONAL PRINCIPLES DEFINING AND LIMITING THE AUTHORITY OF THE STATES UNDER THE ELECTIONS CLAUSE TO REGULATE FEDERAL ELECTIONS

1. The authority of the States to regulate congressional elections is defined and limited by the Elections Clause, U.S. Const. Art. I, § 4, Cl. 1, which authorizes the States to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives." The Framers of the Constitution recognized benefits in permitting the States, which had experience in running elections, to operate elections for the new national government as well, but they also perceived that the States might abuse their powers over federal elections to undermine the union. See The Federalist No. 59, at 363 (Hamilton) (Clinton Rossiter ed. 1961)). The Convention therefore designed the Elections Clause as a narrow delegation of authority, not a plenary grant of power, to the States. The Framers conceived the power granted to the States in the Elections Clause as restricted to the authority "to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995) (*USTL*).

The Missouri Amendments fail to respect those limitations on the State's authority under the Elections Clause. They are designed precisely to "dictate electoral outcomes" and to "disfavor a class of candidates" by affixing a pejorative label to the name of any candidate on the ballot who disagrees

with state orthodoxy on the subject of term limits.[3] They also "evade important constitutional restraints"—indeed, they are inconsistent with fundamental constitutional principles governing the structure of the federal government.

2. The Missouri Amendments are inconsistent with the fundamental constitutional principle that Members of Congress must be chosen in free and fair elections. The importance of elections under the Constitution is manifest in its provisions for election of Representatives, U.S. Const. Art. I, § 2, Cl. 1, and Senators, Amend. XVII, § 1, and for the steady expansion of the franchise over time to eliminate qualifications of race, Amend. XV, sex, Amend. XIX, failure to pay a poll tax, Amend. XXIV, and age, Amend. XXVI. This Court has repeatedly observed that "voting is of the most fundamental significance under our constitutional structure," *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

Implicit in the idea of a fair election are the twin notions of a robust competition for votes prior to the election, and the protection of the voter from undue influence at the moment of deciding and casting a vote. Toward the latter end, this Court has emphasized that "protecting voters from confusion and undue influence," *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion), is a compelling governmental interest. Thus, the State may prohibit campaigning within 100 feet of the entrance to a polling place on election day.

The authority to operate federal elections, conferred on the States by the Elections Clause, does not include the authority to attempt to favor certain candidates and disfavor others. Indeed, the States' authority to regulate federal elections extends only to "generally applicable and even-

---

[3] For much the same reason, they violate the First Amendment. See pp. 15-21, *infra*.

handed restrictions that protect the integrity and reliability of the electoral process itself," see *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 n.9 (1983), and not to efforts to influence the outcome. While government officials may undoubtedly engage in pre-election speech concerning the merits of the candidates in an election, the State may not use its power to administer elections to overbear the right of "the people [to] choose whom they please to govern them." *USTL*, 514 U.S. at 793 (internal quotation marks omitted).[4]

The State's power over the ballot, moreover, presents special dangers of undue influence in the outcome of an election. By its nature, the ballot is not a public forum in which numerous participants can engage in a debate over issues.[5] Rather, the State has a monopoly over the ballot

[4] Several courts have invalidated attempts to favor certain candidates or parties by assigning them preferred positions on the ballot. See, *e.g.*, *McLain* v. *Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980); *Sangmeister* v. *Woodard*, 565 F.2d 460, 465-467 (7th Cir. 1977), cert. denied, 435 U.S. 939 (1978); see also *Coalition to End the Permanent Congress* v. *Runyon*, 979 F.2d 219, 225 (D.C. Cir. 1992) (separate opinion of Silberman, J.) (explaining vote to invalidate part of congressional franking statute because "the very nature of American constitutional democracy requires that voters be able to choose freely between at least two viable parties or candidates").

[5] The Court has often emphasized that ballots "serve primarily to elect candidates, not as forums for political expression." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 363 (1997); see also *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992); *id.* at 445 (Kennedy, J., dissenting) ("the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression"). This case therefore does not require the Court to ascertain general constitutional limits on the broad category of "government speech." Cf. *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1357 (2000); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-834 (1995); *Meese* v. *Keene*, 481 U.S. 465, 484 (1987). This case does not involve discussion of issues, or even elections, by government officials in a public forum. Nor does it concern the government's right to publish voter information guides about an election. Rather, this case involves only the State's exercise of its monopoly power over the ballot itself to affix a label that disfavors candidates based on their position on one particular issue.

and is in a position to deploy that power to affect the outcome of elections.

The Missouri Amendments have the purpose and effect of influencing the outcome of elections. Missouri uses the ballot labels to assert to the voters that certain candidates have not accepted the people's will and do not deserve their trust and confidence, but it permits no rebuttal to those assertions in the voting booth. At the moment of choosing among candidates, therefore, voters are left with the powerful impression created by the ballot labels.[6] Cf. *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964) (invalidating State's use of ballot labels indicating the race of a candidate, and noting that a ballot "label on a candidate [appears] at the most crucial stage in the electoral process—the instant before the vote is cast"). Such use of the State's power over the ballot to influence the outcome of an election is inconsistent with a basic principle of popular sovereignty—"the right of the people to vote for whom they wish." *USTL*, 514 U.S. at 820.

[6] The fact that the Missouri Amendments were at the time of their adoption supported by a majority of the voters does not cure their constitutional defect. The ballot labels required by the Amendments have the potential to confuse voters or to overbear their free choice at each subsequent election. For example, even if a majority of a particular congressional district does not support term limits, the ballot labels declare that a noncompliant incumbent has "DISREGARDED [THE] VOTERS' INSTRUCTION ON TERM LIMITS," suggesting that the Member has disregarded the wishes of all the voters, not just the majority that supported the proposed term-limits amendment in the initiative. Similarly, a majority of the voters of the entire State might now or in the future no longer support the proposed term-limits amendment, and yet if the constitutional amendment requiring the ballot labels had not yet been repealed, a candidate for Congress who publicly opposed term limits could nonetheless be labeled as noncompliant with the voters' wishes.

3. In addition to introducing bias into the election, the Missouri Amendments have the defect of interjecting the State between the people of Missouri and their own federal representatives, thereby interfering with a direct relation between them that is an essential element of the constitutional structure.

The Framers saw the "great and radical vice" of the Articles of Confederation as "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, at 108 (Hamilton). The Framers therefore discarded the confederal structure of the Articles for a national government that "extend[ed] the authority of the Union to the persons of the citizens." *Id.* at 109. But the Framers perceived that the States might attempt to subvert the connection between the people and the union, and so the question arose how to ensure that "[t]he people of America [remain] warmly attached to the government of the Union, at times when the particular rulers of particular States * * * may be in a very opposite temper." The Federalist No. 59, at 365-366 (Hamilton).

To the Framers, the solution lay in the republican character of the union. As Madison observed at the Convention, the union could be "stable and durable" only if the legislature "should rest on the solid foundation of the people themselves," rather than an intervening body. 1 *The Records of the Federal Convention of 1787*, at 50 (Max Farrand ed., rev. ed. 1966). The Framers therefore required biennial elections to the House of Representatives to ensure that the federal Congress would retain "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 327 (Madison). The Framers also prohibited the States from adding qualifications for service in the Congress beyond those established in the Constitution, which might undermine popular support for the new national legislature. See *USTL*, 514 U.S. at 806-808. As the Court explained in *USTL*, the Constitution established that "the right to choose representatives belongs not to the States, but to the people." *Id.* at 820-821.[7]

The Missouri Amendments' manipulation of the ballot for federal elections impermissibly interferes with the connection between the people of Missouri and the union. In assigning a pejorative ballot label to a candidate for federal office who does not accept the State's orthodoxy of support for a particular measure, the State announces its judgment that the candidate does not deserve the trust and confidence of the people of Missouri. It does so, moreover, in the voting booth and at the moment of voting—the very point on which, the Framers understood, the success of the union depends. By interposing its own judgment about the preferable outcome of a federal election, the State intrudes on "the most basic relation between the National Government and its citizens, the selection of legislative representatives." *USTL*, 514 U.S. at 842 (Kennedy, J., concurring).[8]

4. The Missouri Amendments are also inconsistent with the constitutional structure of the union because they seek to constrain by law the legislative activity of federal officials. The Amendments attempt to inhibit the election or reelec-

---

[7] With the adoption of the Seventeenth Amendment in 1913, this principle became applicable to the Senate as well. *USTL*, 514 U.S. at 821.

[8] This interference is not minimized by the fact that the measure directing the ballot labels to be assigned to noncompliant candidates was adopted by popular initiative rather than legislation. The ballot labels are the policy of the State no less than they would be if they had been adopted by legislation—just as the ballot exclusions struck down in *USTL*, which were also adopted by popular initiative, were the official policy of the State. See *USTL*, 514 U.S. at 809 n.19. Moreover, the determination whether to apply the labels to any particular candidate is made by the Secretary, an elected state official.

tion of a candidate who has not acted or will not promise to act in accordance with the instructions of the State of Missouri. Federal legislators, however, are charged with acting on behalf of all of the nation's citizens, regardless of their State of residence. See *USTL*, 514 U.S. at 837-838 ("Members of Congress * * * become, when elected, servants of the people of the United States[;] * * * they occupy offices that are integral and essential components of a single National Government."). The Amendments undermine the national character of the union, which depends on a connection between Members of Congress and the people of *all* the States of the union.[9] Because, under the Constitution, Members of Congress legislate in the national interest, not merely the interest of the State from which they are elected, a State may not seek to confine a federal legislator's authority to consider the national interest by handicapping him on the ballot if the Member (or would-be Member) will not act in accordance with the official policy of the State.

Indeed, the Missouri Amendments may well be more disruptive of the national character of the union than were the Arkansas term limits invalidated in *USTL*. The provision at issue in *USTL* did not seek to constrain Members of Congress elected from Arkansas to vote in any particular way. Every Member elected from Arkansas still remained free to consider the national interest on every issue, and to vote in accordance with that Member's judgment of the national interest. The Missouri Amendments, by contrast, endeavor to ensure that federal legislators vote in accordance with a particular policy of that State, even if a

[9] See *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43 (1868) ("The people of these United States constitute one nation * * * [and] have a government in which all of them are deeply interested."); *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999) ("our citizens have two political capacities, one state and one federal, each protected from incursion by the other").

legislator believes that the policy is contrary to the interest of the nation as a whole.[10]

II. THE MISSOURI AMENDMENTS VIOLATE THE FIRST AMENDMENT

1. The Missouri Amendments are also unconstitutional because they operate as an unreasonable and discriminatory condition on access to the ballot. To obtain a spot on the ballot unblemished by a pejorative state label, a candidate for office must demonstrate to the satisfaction of a state official that he has supported, or has pledged to support, a particular state policy, adoption of the proposed term-limits amendment. The appeal process, moreover, is biased to impose the burden of proof, by clear and convincing evidence, on the party arguing that the ballot label is not warranted,

[10] Although we do not address herein at length the Qualifications Clauses of Article I or the constitutional-amendment requirements of Article V, the points made in the text support the court of appeals' conclusion that the Amendments violate those provisions as well. As the Court observed in *USTL*, by prohibiting Congress and the States from imposing any qualifications for service in Congress beyond those set forth in the Qualifications Clauses, the Framers intended to ensure that the people would be able to choose for Congress any "citizen whose merit may recommend him to the esteem and confidence of his country." 514 U.S. at 819 (quoting The Federalist No. 57, at 351 (Madison)). The Missouri Amendments undermine that free choice by "handicapping a class of candidates," *id.* at 831, with the purpose of preventing the election of candidates who decline to support the proposed term-limits amendment. In addition, by constraining Members elected from Missouri to vote on a proposed constitutional amendment on the governance of the national union in conformity with direction from the State of Missouri and not the Member's judgment of the national interest, the Amendments are inconsistent with the Constitution's presumption that Members of Congress, when exercising their authority under Article V to propose an amendment to the Constitution of the national government, will act on behalf of "the whole people who created it." *Id.* at 839 (Kennedy, J., concurring).

even if that party is not the one taking the appeal. See Mo. Const. Art. VIII § 19(5) and (6). Thus, the Amendments effectively require that a candidate demonstrate support for state orthodoxy as a condition of obtaining a clear ballot spot. Such a condition on unimpaired ballot access violates the First Amendment.[11]

The Court has, of course, recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). Moreover, every provision of an election code that channels the process of selection invariably affects, at least to some degree, the right of candidates to gain access to the ballot (and the rights of voters who support them). See *Burdick*, 504 U.S. at 433; *Anderson* v. *Celebrezze*, 460 U.S. at 788. Thus, when a State imposes "reasonable, nondiscriminatory restrictions" on ballot access, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Ibid.*

The Missouri Amendments, however, cannot be characterized as "reasonable, nondiscriminatory" regulations of the

[11] This Court has generally reviewed discriminatory conditions on ballot access under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. See *Anderson* v. *Celebrezze*, 460 U.S. at 786 n.7. Because this case involves state regulation of the ballot for elections to federal office, the question also arises whether the regulations exceed the State's authority under the Elections Clause. The Court has made clear that the limitations on the State's authority to regulate the ballot for federal elections imposed by the Elections Clause are at least as strict as the restrictions imposed by the First and Fourteenth Amendments. See *USTL*, 514 U.S. at 834; see also *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Because, as we explain in the text, the Missouri Amendments contravene the First Amendment, they necessarily exceed the State's authority under the Elections Clause as well.

ballot similar to those previously upheld by this Court. Most importantly, the requirements imposed by the State as a condition of avoiding a pejorative ballot label are neither content-neutral nor viewpoint-neutral. The conditions, rather, require candidates to express support for a particular position in a particular way if they wish to avoid unfavorable treatment on the official ballot. Even if a candidate would prefer to take no position at all on the issue of term limits, or would prefer to take a position only slightly at variance with the state orthodoxy, the candidate will be assigned a denigrating label on the ballot informing the voters that the candidate has declined to support the official state position on term limits. The Amendments therefore operate as an unconstitutional condition; they require something the State plainly could not directly compel—that the candidate express a particular point of view on a particular issue[12]—as a condition of obtaining a benefit from the State, an unimpaired ballot position. Cf. *Board of Comm'rs* v. *Umbehr*, 518 U.S. 668, 675-676 (1996).

2. Petitioner argues that the Missouri Amendments do not implicate candidates' First Amendment rights because they do not flatly exclude from the ballot incumbents who have failed to vote as instructed or non-incumbent candidates who have declined to pledge to do so if elected. A realistic evaluation of the ballot labels and of the conditions imposed by the Missouri Amendments confirms, however, that the Amendments must be subject to strict scrutiny.

First, both the conditions and the ballot labels are viewpoint-based, a factor that almost invariably requires the application of strict scrutiny. See *Rosenberger* v. *Rector &*

[12] See *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995) ("[T]he choice of a speaker not to propound a particular point of view * * * is presumed to lie beyond the government's power to control.").

Visitors of Univ. of Va., 515 U.S. 819, 828-830 (1995). We are unaware of any case in which this Court has upheld a viewpoint-based regulation of the ballot, and it is difficult to imagine a situation in which such a regulation could be justified.[13] Indeed, a discriminatory viewpoint-based condition on unimpaired access to the ballot presents a serious concern that the State is attempting "to drive certain ideas or viewpoints from the marketplace" (*NEA* v. *Finley*, 524 U.S. 569, 587 (1998))—namely, that the State is attempting to discourage candidates who oppose term limits, or at least the specific proposed term-limits amendment set forth in the Missouri Amendments.

Second, the ballot labels send an official signal to the electorate that, because the candidate has declined to accept the term-limits instruction as binding, that candidate does not deserve public confidence. The ballot label significantly

[13] Thus, although the State may regulate access to the ballot in pursuit of legitimate, non-discriminatory objectives, that does not permit it to impose viewpoint-based conditions on access to the ballot—just as a State may not condition access to public employment on adherence to a certain political party, even though the State may plainly impose numerous regulations on public employment. Cf. *Board of Comm'rs* v. *Umbehr*, *supra*. And although this Court has on numerous occasions upheld regulations that restrict access to the ballot to those candidates who have demonstrated that they have a nontrivial level of support in the community, see *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 194-195 (1986); *Anderson* v. *Celebrezze*, 460 U.S. at 788-789 n.9; *American Party of Tex.* v. *White*, 415 U.S. 767 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971), the Court has never suggested that a State may use that power to insist that candidates show that they have substantial popular support for a particular position, or (as here) that they have adopted a particular position that has substantial support in the community. A State could not, for example, require candidates seeking access to the ballot to show that a certain percentage of the electorate supported their positions on tax relief and gun control. Such a regulation would skew the election to the topics that the State, rather than the candidate, deemed sufficiently important to present to the electorate.

infringes on the candidate's ability to present himself to the voters for serious consideration. A State could hardly require that the names of candidates who had declined to support a particular state policy be printed in tiny type, or be marked by the Secretary of State as "state-disapproved" candidates. While the burden imposed on candidates by the Missouri Amendments may not be quite so drastic as those in the hypothetical examples just given, the vice of the Missouri Amendments is the same: the State uses its control of the ballot to insist that candidates adopt a particular position on a particular issue if they wish to gain access to the voters on an equal footing.[14]

Petitioner further contends (Pet. Br. 36-37) that the Amendments leave candidates free publicly to oppose term limits, as long as they state publicly that they will agree to adhere to the State's instructions to exercise legislative power in support of the term-limits amendments (and do so once elected). Even if that were true, it could not justify the Amendments' burden on candidates' rights of freedom of expression—just as an impermissible patronage practice re-

[14] Petitioner also argues (Pet. Br. 32-34) that the Amendments are not subject to First Amendment scrutiny at all because the ballot labels supposedly comment only on a candidate's behavior, not speech. That contention is without merit. With respect to non-incumbent candidates, the assignment of a ballot label turns on whether the candidates takes a "pledge" of specific words, see Mo. Const. Art. VIII, § 18(3), which is unquestionably speech. With respect to incumbent candidates, the assignment of a ballot label turns on whether the Member of Congress has used his or her legislative authority in certain ways, including making proposals in Congress, see *id.* § 17(2)(c), sponsoring amendments, § 17(2)(g), and voting for the proposed term-limits amendment, § 17(2)(a). Whether or not the act of voting in Congress is itself protected by the First Amendment, see *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting), the Missouri Amendments touch on other legislative activity that is plainly speech, such as sponsoring amendments and proposing legislation.

quiring public employees to join the Democratic Party (cf. *Board of Comm'rs* v. *Umbehr*, *supra*) could not be justified on the ground that the employees remained free to criticize that party's policies.

In any event, the State's reading of the Amendments is implausible. An incumbent candidate could scarcely make speeches in Congress against the term-limits amendment and escape the ballot label, since the Amendments instruct Members to use *all* of their delegated powers to pass the amendment. See Mo. Const. Art. VIII, § 17(1). At a minimum the Secretary of State would be required to determine whether the Member had acted in accordance with the instructions, with the burden tilted heavily in favor of finding that the Member had not complied. And if a non-incumbent candidate signed the pledge to vote in favor of the term-limits amendment but then proceeded to denounce the same amendment as ill-considered, that candidate would also likely find himself before the Secretary of State to face the contention that his pledge was not genuine. The prospect of a candidate's being required to justify his campaign literature and speeches to the satisfaction of a state official is incompatible with the First Amendment's guarantee of free speech.

3. Because the Missouri Amendments require strict scrutiny, they may be upheld only if the ballot conditions and labels are narrowly tailored to advance a compelling state interest. See *Norman* v. *Reed*, 502 U.S. 279, 289 (1992). Petitioner argues (Pet. Br. 40-42) that the Missouri Amendments advance the state interest of informing voters about candidates' willingness to act in accordance with the instructions. We may assume the State has a substantial interest in educating the voting public about candidates' positions on issues of public concern. But there is no apparent reason why the State could not provide the public with information about the candidates' positions on term limits—including

their positions on the proposed term-limits amendment—without intruding into the ballot itself or requiring candidates to speak or act in specified ways as a condition of unimpaired ballot access. For example, the State could prepare voter information guides in which candidates are afforded the opportunity to explain their positions on the term-limits amendment and address their opponents' records on the same subject.

Moreover, the ballot labels required by the Amendments do not substantially promote voter education. The labels are misleading in important respects. If, for example, a non-incumbent candidate supports term limits generally but believes that the state-approved term-limits amendment is too draconian and therefore declines to pledge to support that amendment, the candidate will be labeled on the ballot as having "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS"—with no opportunity to explain on the ballot that he does, in fact, support term limits but in a different form. Similarly, an incumbent who supports term limits (including the proposed term-limits amendment) but who has found it inadvisable for tactical considerations to press for a vote on the amendment at a particular time will nonetheless be labeled in the voting booth as having "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS," again without any opportunity to explain the circumstances to the voters. Thus, even if the State might be able in another context to justify ballot labels identifying candidates' positions on particular issues, it has not demonstrated that these labels promote the interest of voter education.

III. THE MISSOURI AMENDMENTS VIOLATE THE SPEECH OR DEBATE CLAUSE

1. The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S.

Const. Art. I, § 6, Cl. 1. The Clause was "designed to preserve legislative independence." *United States* v. *Brewster*, 408 U.S. 501, 508 (1972); see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) ("The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently."); *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979) (the purpose of the Clause "was to preserve the constitutional structure of separate, coequal, and independent branches of government").

Although the Clause was born of concern specifically with shielding legislators from vindictive criminal prosecutions brought by the Executive Branch as punishment for legislative criticism, *Helstoski*, 442 U.S. at 491-492, it has been applied broadly to prevent federal legislators from being subjected to scrutiny by governmental officials for their legislative acts "in *any* other Place," as the Clause states.[15] Furthermore, the Clause shields Members "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). In addition, the Clause, although expressly reaching only "Speech or Debate," has long been interpreted to protect anything "generally done in a session

[15] The Clause thus protects federal legislators from being "[q]uestioned" about their legislative activity by state officials as well as federal officials. Plainly, the imposition of criminal or civil liability against a Member of Congress under state law for the Member's legislative acts could seriously impair that Member's independence. Thus, in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), a state-law tort action brought in federal court against a United States Senator, the Court nowhere suggested that the Clause was not applicable merely because the case arose under state law. Cf. *Doe* v. *McMillan*, 412 U.S. 306 (1973) (Clause held applicable to bar tort action brought against Members of House of Representatives under District of Columbia law); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881) (same).

of the [Congress] by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881). Voting by Members is plainly covered by the Clause, as is all action taken by Members at legislative committee hearings. See *Helstoski*, 442 U.S. at 487-488; *Doe* v. *McMillan*, 412 U.S. 306, 311 (1973); *Brewster*, 408 U.S. at 509. The Clause thus prohibits the introduction into evidence of a Member's vote in litigation pertaining to the Member's personal interest. See *Helstoski*, 442 U.S. at 487-488.

2. The Missouri Amendments contravene these principles. Under the Amendments, a Missouri state official (and, on judicial review, the Missouri Supreme Court) must examine the legislative acts of Members of Congress who are running for reelection to determine whether they have complied with the terms of the Amendments' instruction to undertake specific actions in Congress. The outcome of that examination leads to an official determination whether the State will impose a burden on or grant a benefit to the Member—namely, whether the Member will have a pejorative label affixed to his name on the election ballot, or whether his spot on the ballot will not be so burdened. The Clause prohibits the State from attaching legally significant consequences to the legislative acts of Members of Congress in this fashion.

The State's determination requires the introduction of evidence about the Member's votes and other legislative acts in Congress. See Mo. Const. Art. VIII, § 19(2). The Secretary must ascertain whether the Member has taken or failed to take a litany of specified legislative acts, including introducing, proposing, bringing to a vote, and seconding the proposed term-limits amendment, voting in favor of that amendment and against any other amendment that would establish longer terms, and opposing any effort to table or delay legislative consideration of the favored amendment.

Id. Art. VIII, § 17(2). Moreover, this examination of the Member's legislative record may be wide-ranging and intrusive. For example, the Secretary must affix the ballot label if she determines that the Member has "fail[ed] to propose" the amendment for a vote in Congress (should the amendment otherwise lack such a proponent) or has "fail[ed] to reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of the proposed" term-limits amendment. *Id.* Art. VIII, § 17(2)(c) and (e). In making such determinations, the Secretary could be required to consider, not just votes recorded in the *Congressional Record* and other information readily available to the public, but also information submitted from interested groups concerning communications between a Member and the leadership of the Member's chamber about legislative priorities. See *id.* Art. VIII, § 19(2) (providing that Secretary may consider public comments in making her determinations). If a member of the public contended that a Senator had "fail[ed] to reject any attempt to delay" a vote on the term-limits amendment, the Senator could likely meet that contention only by providing an explanation of his understanding of the matters pending on the legislative calendar and his evaluation of the relative priorities of those matters. And because the Secretary of State's determination not to affix a ballot label may be sustained on judicial review only if clear and convincing evidence supports it, see *id.* Art. VIII, § 19(5), the Member's submission will likely have to be quite detailed to be effective.

The Speech or Debate Clause does not permit state officials to require federal legislators to justify their legislative actions in such a fashion. The intrusive inquiry into a legislator's record mandated by the Amendments threatens to undermine the independence of federal legislators by effectively compelling them to present a detailed explanation of their legislative actions and strategy to the satisfaction of

a state official, at pain of official state disapproval in the form of a pejorative ballot label if they fail to persuade state officials (and judges) by clear and convincing evidence that their legislative activity comports with the official state policy favoring the term-limits amendment. The inquiry also threatens to distract Members of Congress from their legislative activity by requiring them to spend time preparing their justifications for a state official proceeding.

3. Of course, nothing in the Speech or Debate Clause prevents state officials (or members of the public) from calling on Members of Congress to explain their actions with respect to legislation, asking questions of Members about such actions in debates, or criticizing a Member's legislative record. The Clause does not insulate Members from political accountability for their legislative actions. In those situations, however, no official governmental benefit or burden turns directly on the Member's response. A Member may choose whether and how to respond to the question or criticism and retains the freedom to take the political consequences of responding, not responding, or framing the response in a particular way. The Member's accountability to the voters is preserved, as is his independence from official coercion and oversight.

It is quite a different matter to place in the hands of a state official the power to determine how an incumbent candidate shall be treated on the ballot based on that Member's legislative record. While a pejorative ballot label is not a criminal punishment or civil penalty, it nevertheless is an official action imposing a burden on the candidate. There may be close cases in which it is unclear that unpleasant consequences visited upon an incumbent candidate by state officials because of that Member's legislative record constitute

impermissible "question[ing]" of the Member in violation of the Speech or Debate Clause, but this is not one.[16]

IV. THE STATE'S HISTORICAL EXAMPLES OF INSTRUCTIONS TO LEGISLATORS AND BALLOT NOTATIONS DO NOT SALVAGE THE MISSOURI AMENDMENTS

The State maintains that instructions to legislators and ballot notations have a historical pedigree that establishes the constitutionality of the Missouri Amendments. The State maintains, for example (Pet. Br. 10-14), that the colonial legislatures and, after independence, the States issued instructions to their delegates to the Continental Congress, the Confederation Congress, and the Constitutional Convention. The State also points out that state legislatures occasionally issued instructions to Senators elected by those legislatures before the adoption of the Seventeenth Amendment.

None of those examples, however, involved ballot labels imposed by the State or state-imposed conditions on a candidate's access to the ballot for a popular election. None of them, therefore, is helpful to analyze the Missouri Amendments, under which a state official makes a formal determination whether a candidate has spoken or acted on an issue of public concern in a particular way, and then determines how the State shall present that candidate to the electorate. Indeed, almost all the State's examples involved

[16] It would seem clear, for example, that the Speech or Debate Clause would prohibit a State from requiring Members of Congress who had voted in a particular way to go through especially onerous steps to qualify for the ballot, such as collecting an inordinately large number of signatures or paying an exorbitant filing fee. The Missouri Amendments may differ from those examples in a matter of degree, but the Amendments are similar to those examples in that a central purpose of the Amendments is to make it more difficult for a Member of Congress to secure reelection if that Member has voted or failed to vote in a particular way in Congress.

situations where the instruction was issued to a delegate by a body with complete control over the process of determining whether and how that delegate should be considered for reelection—for example, the States' delegates to the Confederation Congress, and Senators elected by state legislatures before the Seventeenth Amendment. In those situations, it is difficult to speak meaningfully of any impairment of a right of ballot access, as there was no popular election.

The electorate does, of course, have authority to reject any candidate for Congress based on his articulated or unarticulated position on term limits. But unlike the election of Senators before the Seventeenth Amendment, popular election of Members of Congress depends on a ballot mechanism. And no example put forward by petitioner suggests that the State could officially hobble a candidate in a popular election campaign because of that candidate's unwillingness to abide by state instructions.[17]

The State also points out (Pet. Br. 15-17) that, before the Seventeenth Amendment provided for popular election of Senators, several States adopted by initiative provisions

[17] More generally, the State's examples fail to demonstrate that the Framers would have accepted instructions that were binding, in the sense that a government official could impose any sanction of substantial consequence for the failure of a legislator to follow, or a candidate to accept, a state legislature's instructions. Indeed, with respect to candidates for federal office, it is indisputable that the Constitution would forbid a State from imposing at least some sanctions of that nature. A State could not exclude from the ballot any candidate for Congress who refused to accept state instructions on any subject, for such a rule would impermissibly impose qualifications for the federal office beyond those permitted by the Qualifications Clauses of Article I. See generally *USTL*, 514 U.S. at 798-802, 829-831. And the Speech or Debate Clause would plainly forbid a State from imposing civil or criminal sanctions on a Member of Congress based on that Member's failure to follow state instructions. See pp. 22-26, *supra*.

that informed voters on the ballot whether candidates for state legislature had pledged to vote for United States Senator in conformity with results of an unofficial poll that indicated the popular choice for Senator. In most of those cases, however, the provisions were permissive; they merely allowed candidates to declare to the voters on the ballot that they had agreed (or had not agreed) to accept the voters' expressed preference for Senator. The State did not itself assign a disapproving ballot label to candidates who had declined to promise to act in accordance with that preference. See 1 George H. Haynes, *The Senate of the United States: Its History and Practice* 101-103 (1938).[18] Thus, those ballot laws did not condition a clean position on the ballot on the candidate's adoption of any particular position.

Nor does *Ray* v. *Blair*, 343 U.S. 214 (1952), support the State's position. In that case, the Court upheld a state law that allowed political parties to require that candidates for the position of presidential elector in a party primary pledge, if elected, to support the national party's nominees for President and Vice President. (The party would not certify a candidate for a place on the primary ballot unless he made such a pledge.) The Court rejected the contention that the law violated the Twelfth Amendment in that it constrained electors' discretion to vote for President according to their own judgment. The Court stressed, however, that the purpose of the state law was to strengthen the political party system, see *id.* at 221-222, 226 n.14, which the Court has long recognized as a legitimate objective of state regulation over

[18] North Dakota's law, which did require candidates for state legislature to pledge to vote for United States Senator in accordance with the expression of popular will at the party primary or general election, was struck down under the state constitution on the ground that it added to the qualifications for state legislator beyond those prescribed in the state constitution. See *State ex rel. McCue* v. *Blaisdell*, 118 N.W. 141, 144 (N.D. 1908).

elections.[19] Moreover, the law upheld in *Ray* was neutral as to content and viewpoint; it did not require presidential electors to express support for any *particular* position or candidate as a condition of ballot access, but merely allowed parties to require would-be electors to support whatever candidate the party nominated.[20] Accordingly, petitioner has not pointed to any historical evidence suggesting that a State may place a pejorative label on the ballot next to the name of a candidate who has failed to satsify a state official that he has accepted or complied with state instructions on a particular substantive issue.

[19] The law under review in *Ray* was similar to laws protecting political parties against raiding, which the Court has upheld on several occasions. See *Burdick*, 504 U.S. at 439; *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973).

[20] Petitioner and amici note (Pet. Br 21-22; Mo. Term Limits Br. 11-14) that States frequently recognize the important role played by political parties in our electoral system by indicating candidates' party affiliation on the ballot label. The placement of a party label on the ballot, however, is not a viewpoint-based regulation. While voters may perceive that a particular political party has a particular viewpoint, the placement of *all* candidates' partisan affiliations (if they have one) on the ballot does not send any particular message to the electorate. Thus, even-handed disclosure of candidates' partisan affiliation on the ballot presents no threat to candidates' and voters' First Amendment rights.

It is conceivable, of course, that a State might abuse its policy of placing candidates' party affiliation on the ballot to suggest to the voters that a candidate who is not affiliated with a major political party deserves the voters' disapproval. The Court has never suggested, however, that such a practice would be constitutional. See p. 10 & note 4, *supra* (discussing appellate decisions invalidating preferential ballot treatment for incumbents); cf. *Anderson* v. *Celebrezze*, 460 U.S. at 793-794 (close scrutiny required for "[a] burden that falls unequally on new or small political parties or on independent candidates" because "such restrictions threaten to reduce diversity and competition in the marketplace of ideas").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
DOUGLAS N. LETTER
DANA J. MARTIN
Attorneys

AUGUST 2000

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

(4)

No. 99-929

IN THE

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE U.S. PIRG EDUCATION FUND IN SUPPORT OF PETITIONER

DAVID JONATHAN FINE
DANGEL & FINE, LLP
10 Derne Street, P.O. Box 9505
Boston, Massachusetts 02114-9505
(617) 557-4800

Counsel of Record for Amicus Curiae
U.S. PIRG Education Fund

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

25pp

Table of Contents

Table of Authorities ii

Statement of Amicus Curiae 1

Summary of Argument 3

Argument 7

Preliminary Statement 7

I. The Missouri Initiative Amendment Did Not Violate the First Amendment 8

II. The Missouri Initiative Amendment Did Not Violate the Speech and Debate Clause . . 16

III. The Missouri Initiative Amendment Did Not Violate the Qualifications Clause. 17

IV. The Missouri Initiative Amendment Did Not Violate Article V 18

Conclusion 21

Table of Authorities

Cases

Barr v. Mateo, 360 U.S. 564 (1964) 12

Beauharnais v. Illinois,
343 U.S. 250 (1952) 11

Board of Regents of University
of Wisconsin System v. Southworth,
120 S.Ct 1346 (2000) 4, 9

Brown v. Hartlage, 456 U.S. 45 (1982) 15

Kimble v. Swackhammer,
439 U.S. 1835 (1978) 8

New York Times Co. v Sullivan,
376 U.S. 254 (1964) 11, 12

Nixon v. Shrink Missouri Government PAC,
120 S.Ct 897 (2000) 7, 20

Roth v. United States,
354 U.S. 476 (1957) 13

Stromberg v. California,
283 U.S. 359 (1931) 13

U.S. Term Limits v. Thornton,
514 U.S. 779 (1995) 5, 17

Interest of Amicus Curiae

The U.S. PIRG Education Fund submits this brief in support of Petitioner.[1] Pursuant to Supreme Court Rule 37.3(a), this brief is accompanied by written consents from all parties.

The U.S. PIRG Education Fund is a non-profit, non-partisan organization that conducts research and public education on issues that affect the public interest. The U.S. PIRG Education Fund is affiliated with U.S. PIRG and the state Public Interest Research Groups, including Missouri PIRG. The PIRGs conduct advocacy and research on public interest issues at the federal and state level, including public health, environmental and consumer protection, higher education, and promoting good government.

The PIRGs support political reform to make government accountable to ordinary citizens. Government by the people, while not flawless, is inherently better than rule by enlightened elites and is not only more likely to yield a political process that serves the public interest but is

---

[1] This brief has been authored entirely by counsel for the U.S. PIRG Education Fund. No person or entity other than the U.S. PIRG Education Fund has made any monetary contribution to the preparation or submission of this brief.

essential to the ideals of freedom and democratic self-government.

Neither the U.S. PIRG Education Fund nor the state PIRGs have a position regarding the limitation of terms for members of Congress. Our interest in this case lies in preserving U.S. citizens' inherent rights to instruct their elected officials as to how they wish them to act and to be well informed as to how elected officials have carried out those instructions. That right is jeopardized by the Eighth Circuit's ruling.

The U.S. PIRG Education Fund has a deep appreciation for the use of voter instruction and ballot notation at critical points in our country's history, and we generally support this process as a critical tool that citizens need to engage in meaningful representative democracy. In addition, the PIRGs have considered using similar methods to express the will of the people regarding issues that PIRGs work on, and to inform the electorate regarding the actions of candidates and incumbents. We would like to preserve our ability to use ballot notation in the future. In particular, the PIRGs support the passage of a constitutional amendment regarding campaign finance reform, and we are familiar with the difficulties in persuading members of Congress to adopt structural reforms that are contrary to their own self-interests.

PIRGs have also supported ballot notation in the past to promote behavior by elected officials that voters believe to be in the public interest. In 1996, Colorado PIRG, Colorado Common Cause, and the Colorado League of Women Voters supported a ballot question, known as Amendment 15, that expressed the will of the citizens of Colorado that candidates for state legislature abide by voluntary spending limits and used ballot notation to inform voters of which candidates had not complied with the limits. Specifically, in the interest of "encouraging voluntary spending limits," Amendment 15 called for each primary and general election ballot to "clearly indicate which state candidates have accepted the applicable spending limit and which state candidates have not accepted the voluntary spending limit." Although this provision has since been removed by the legislature, if this Court were to uphold the Eighth Circuit's ruling, it would have an adverse impact on the PIRGs' ability to support similar legislation in other states.

Summary of Argument

1.a. The Missouri Initiative Amendment did not violate the First Amendment because, contrary to the characterization of the opinion below, the State of Missouri's role regarding the initiative measure was viewpoint-neutral. All Missouri did was to allow its electoral machinery to be used by

initiative measure, regardless of viewpoint. Consequently, Missouri's role vis-a-vis the term limits measure was analogous to the University of Wisconsin's role in Board of Regents of University of Wisconsin System v. Southworth, 120 S.Ct 1346 (2000) and met the standard of viewpoint neutrality for the same reasons the University of Wisconsin's role met that standard vis-a-vis the mandatory student activity fee.

b. The Missouri Initiative Amendment did not improperly compel Congressional candidates to address the issue of term limits. If candidates felt compelled to address the issue, the feeling derived from the vote of their constituents -- a perfectly legitimate form of compulsion for a public official to experience in a democracy.

c. Contrary to the impression created by the opinion below, the ballot label device was not devised by Missouri state officials as a means of biasing Congressional elections. The device was rather proposed by the non-governmental authors of the initiative petition and subject to open debate in the electoral campaign on the Initiative Amendment.

d. The ballot label did not impose an unanswerable sanction. Resourceful candidates could turn such labeling into an electoral asset.

e. While the First Amendment prohibits states from improperly restricting a candidate's ability to present ideas to the voters, the Missouri Initiative Amendment did no such thing. The Initiative Amendment was rather a perfectly appropriate means of communication by the voters.

2. Contrary to the characterization in the opinion below, the Initiative Amendment did not "establish . . . a regime in which a state officer . . . is permitted to judge and punish members of Congress for their legislative actions." All Missouri did was to allow the voters to use the mechanisms of state government to communicate the voters' views. This was plainly not a violation of the Speech and Debate Clause.

3. Unlike the Arkansas term limits measure struck down by U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), the Missouri Initiative Amendment cannot be properly characterized as a self-executing limitation on terms of office. On the contrary, the Missouri measure respects the holding in U.S. Term Limits v. Thornton, implicitly regarding it as the reason it was necessary for the voters of Missouri to express their views on a prospective Constitutional amendment imposing Congressional term limits. Therefore, the Missouri measure plainly did not violate the Qualifications Clause.

4. The Missouri Initiative Amendment did not violate Article V of the United States Constitution. The Missouri Instruct-and-Inform measure was rather a perfectly appropriate means for voters to participate in the Article V amendment process, with deep historical roots in the periods before, during and after the framing of the Constitution, and in the events leading to the passage of the Seventeenth and Nineteenth Amendments. Further, given that incumbent Congressmen can be expected to view the right to run for re-election as a right which it is in their self-interest to retain, and given that our political system makes it inherently difficult to amend that right without Congressmen themselves participating in the effort to amend, means available to voters to bring pressure on Congressmen to act against their perceived self-interest and in the public interest, such as the Missouri Initiative Amendment at issue here, should be treated with deference. Decisions finding such means unconstitutional, such as the opinion below, should be regarded with skepticism.

Argument

Preliminary Statement

In his concurring opinion in Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897, 910 (2000), Justice Breyer observed that in "a case where constitutionally protected interests lie on both sides of the legal question,"

> there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny."
>
> 120 S.Ct. at 911.

"Nor," stated Justice Breyer,

> can we expect that mechanical application of the tests associated with "strict scrutiny" -- the tests of "compelling interests" and "least restrictive means" -- will properly resolve the difficult constitutional problem that campaign finance statutes pose.
>
> Id.

Like cases involving campaign finance statutes, the present case is one "where constitutionally protected interests lie on both sides of the legal

question[s] presented." Because the Eighth Circuit's opinion failed to appreciate this sufficiently, it found Missouri's Congressional Term Limits Initiative Amendment (the "Missouri Initiative Amendment") unconstitutional by mechanically applying four tests which did not properly apply to the case at hand. In doing this, the opinion below focused simply on applying the tests -- tests which virtually guaranteed the conclusion of unconstitutionality -- when what the opinion should have been doing was analyzing more closely and precisely the competing constitutionally protected interests at stake.

This brief will show that when such an analysis is performed, it becomes apparent that the Missouri Initiative Amendment was an eminently appropriate exercise of the constitutionally protected right of Missouri's electorate to "communicat[e]" (Kimble v. Swackhamer, 439 U.S. 1835, 1387 (1978) (Rehnquist, J., Circuit Justice)) with both their representatives in Congress, and their fellow citizens.

I. THE MISSOURI INITIATIVE AMENDMENT DID NOT VIOLATE THE FIRST AMENDMENT.

The First Amendment analysis in the opinion below was fatally defective.

First, the opinion incorrectly viewed the Initiative Amendment as a "content-based," "viewpoint-specific" regulation of speech imposed by the State of Missouri. A. 11. In fact, the State of Missouri's role was entirely content- and viewpoint-neutral. All that Missouri did was to allow its electoral machinery to be employed by the proponents of the Congressional Term Limits Initiative Amendment as Missouri's content-neutral and viewpoint-neutral laws regarding initiatives required the State to do. Therefore, there is a direct analogy between the facts here and the facts in Board of Regents of University of Wisconsin System v. Southworth, 120 S.Ct 1346 (2000).

Speaking of the "mandatory student activity fee" used in part by the University of Wisconsin "to support student organizations engaging in political or ideological speech" (120 S.Ct 1349), this Court observed that:

> The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

This Court reasoned that because "the challenged speech" was not "financed by tuition dollars" and because "the University and its officials" were not "responsible for its content," the "government

itself" was not "the speaker." 120 S.Ct at 1354. Accordingly, the Court upheld the mandatory student activity fee program, concluding that it met the "standard of viewpoint neutrality." Id.

What this Court stated regarding the University of Wisconsin's mandatory student activity fee program applies with equal validity here. Missouri's "whole justification" for the Congressional Term Limits Amendment was that the people of Missouri themselves placed the Amendment on the ballot through the use of an initiative petition, and directly approved the Amendment themselves at an election. The initiative petition campaign was not financed by state taxes and the state government of Missouri and its officials were not responsible for the petition's content, or for the fact that it won the support of the voters. Accordingly, just as in the University of Wisconsin case, "the government itself" was not "the speaker." Had Missouri's voters filed an initiative petition taking precisely the opposite position on the issue of Congressional term limits, or addressing a different issue entirely, the response of Missouri's government in facilitating the submission of the petition to the voters, and in carrying out whatever the voters decided at the election, would have been precisely the same. Thus, Missouri's role was indeed content- and viewpoint-neutral.

Second, the Eighth Circuit's opinion incorrectly construed the Initiative Amendment as improperly "compelling" candidates "to speak about term limits." A. 8. In arriving at this construction, the opinion below failed to take adequate account of the respective roles envisioned by First Amendment jurisprudence for voters and public officials (and would-be public officials) in discourse upon the officials' (and would-be officials') political conduct.

a. In our system of government, there is not simply "the right" but the "duty" to criticize the conduct of public officials. New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964). Indeed, "public men [and women], are, as it were, public property." Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952).

b. Every public official is expected to know this. American politics is not for the faint of heart. Indeed, our system goes out of its way to invite harsh criticism of public conduct by constitutionally precluding defamation suits by public officials even on the basis of demonstrably false accusations so long as the accusations are not knowingly or recklessly false. New York Times v. Sullivan, supra. And public officials are themselves invited to speak with brutal candor by the doctrine which makes a public official absolutely immune from defamation suits by private citizens predicated on statements made by

the official even "within the outer perimeter" of his duties. Barr v. Matteo, 360 U.S. 564, 575 (1964).

c. Next to scandalously false defamation by, for example, a television program seen by millions, the accurate reporting in a ballot label of a Congressman's voting record on term limits, even assuming arguendo that the reporting is phrased in such a way as to convey a "negative impression" (A. 9), is relatively benign. Indeed, it is far too benign to be accurately characterized as improperly coercive. This is especially true where, as here, the official or would-be official has been given advance warning of the ballot label, and knows that the ballot label is appearing as the direct result of an initiative measure approved by the electorate.

d. Finally, given our system of government, no official or would-be official is in a position to complain about feeling compelled by the outcome of an election. On the contrary, an official should feel compelled to address, and take into account, such expressions of the popular will. After all, First Amendment jurisprudence was designed to advance the ideals of our democratic political system, not the other way around. As this Court stated in New York Times v. Sullivan, 376 U.S. 254, 269 (1964),

> The constitutional safeguard [of freedom of expression] . . . "was fashioned to assure

> unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369.
>
> (emphasis added)

Third, in criticizing the ballot labels on the ground that they are worded "pejorative[ly]" (A. 9), are "particularly harmful because they appear on the ballot, an official document produced by the state" (A. 10) and, moreover, "appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label" (A. 10 n.6), the opinion below failed to take into account that all of these attributes of the ballot labels were subject to debate and public scrutiny in the election campaign on the Initiative Amendment. Thus, the opponents of the Amendment were free to argue to voters that even if they were in favor of Congressional term limits, they should vote against the proposed Amendment on the ground

that the ballot labels were an unfair way of advancing their position. Contrary to the impression created by some of the language in the Eighth Circuit's opinion, the ballot labels were not devised by state officials as a means of biasing the election of Congressmen by springing derogatory ballot language on Congressional candidates at the last moment. The ballot labels were rather themselves part and parcel of the Initiative Amendment, drafted by the non-governmental authors of the initiative petition, debated in the campaign on the Initiative Amendment, and devised to take effect no earlier than the next Congressional election. If the respondents in this case had a grievance about the ballot labels, it was a grievance not with the State of Missouri but with their fellow Missourians.

Fourth, the opinion below overstated the nature and severity of the "sanction" imposed by the ballot label. A. 10. The opinion reads as if a Congressional candidate would necessarily be bereft of any effective way of dealing with "the political consequences associated with being labeled on the ballot." A. 10. This seriously underestimates the resourcefulness and ingenuity of American politicians. It is actually not hard to imagine how a Congressional candidate could turn the ballot label into a badge of honor, a proof that the candidate had had sufficient courage to vote his or her conscience notwithstanding the

knowledge that this would put a label next to his or her name on election day.

Fifth, the opinion below completely misconceived the First Amendment rights of political candidates. A. 10-11. In support of its conception, the opinion cited Brown v. Hartlage, 456 U.S. 45 (1982). But Brown addressed the situation where "a State seeks to restrict directly the offer of ideas by a candidate to the voters . . . ." 456 U.S. at 53. The present case involves no such restriction. The Missouri Initiative Amendment does nothing to interfere with or restrict in any way what a Congressional candidate wishes to say to the voters of Missouri. To be sure, the Initiative Amendment constitutes a strong expression of views by the Missouri electorate -- an expression so strong that the candidate may well feel that it is politically perilous not to respond to it. But this is precisely the way American democracy is supposed to work; political candidates are supposed to be responsive to their constituents' expression of views. Thus, by ruling in effect that candidates should not be "imposed upon" by their constituents in this way, the opinion mistook the optimal operation of our political system for its opposite.

II. THE MISSOURI INITIATIVE AMENDMENT DID NOT VIOLATE THE SPEECH AND DEBATE CLAUSE.

The opinion below characterized the Missouri Initiative Amendment as

> establish[ing] a regime in which a state officer -- the secretary of state -- is permitted to judge and punish members of Congress for their legislative actions or positions.
>
> A. 15.

This is a gross misreading of the facts. As discussed above, the Initiative Amendment expressed the views of the electorate. If the electorate had approved an initiative measure taking the opposite position on Congressional term limits, the Missouri Secretary of State would have been required to act in accordance with that opposite position. Thus, all Missouri's initiative apparatus was doing was allowing the voters to use the mechanisms of state government to communicate the voters' views. Far from being a violation of the Speech and Debate Clause, the Missouri Initiative Amendment at issue here was a form of communication by the voters to their representatives, and was, accordingly, in the best tradition of American democracy.

III. THE MISSOURI INITIATIVE AMENDMENT DID NOT VIOLATE THE QUALIFICATIONS CLAUSE.

The opinion below ruled that the Missouri Initiative Amendment represented "an indirect attempt to add a qualification to those listed in the Qualifications Clause" (A. 18) in direct violation of U.S. Term Limits v. Thornton, 514 U.S. 779 (1995). A. 16-18. This ruling misread the facts and misread U.S. Term Limits v. Thornton.

First, unlike the Arkansas term limits measure -- a measure that denied a place on the ballot to any Congressman who was seeking to be elected to a term of office beyond the number of terms specified in the measure -- the Missouri Initiative Amendment can, in no sense, be fairly characterized as a self-executing limitation on terms of office. On the contrary, far from seeking to evade the holding of U.S. Term Limits v. Thornton that Congressional term limits can be imposed only by an amendment to the United States Constitution, the Missouri Initiative Amendment respects that holding and implicitly regards it as the reason why it is necessary for the voters of Missouri to express their views on such a prospective federal Constitutional amendment.

Second, the effort by the opinion below to characterize the Missouri Initiative Amendment as being an unfair means for seeking the end in

question, simply does not ring true. The opinion's claim (A. 18) that it is somehow the ballot labels themselves that pose a dire political risk to Congressional candidates from Missouri who do not support Congressional term limits, seriously underestimates the sophistication of voters and Congressional candidates alike. In actuality, what poses the political risk is not the ballot labels but the vote of 57 percent of the Missouri electorate in favor of the Initiative Amendment. The worry for a Congressional candidate is not that the labels will defeat him or her but the voters who expressed their strong support for term limits by approving the Initiative Amendment. Clearly, a Congressional candidate who opposes term limits will fear that unless the candidate persuades voters to change their view of term limits, or to regard the candidate as worthy of election notwithstanding the voters' disagreement with the candidate on that one issue, the candidate will lose the election. But there is nothing undesirable about such fear; candidates <u>should</u> fear the risk of losing an election on account of disagreement with the candidate's prospective constituents on important issues.

IV. THE MISSOURI AMENDMENT <u>DID NOT VIOLATE ARTICLE V.</u>

The opinion below based its ruling that the Missouri Initiative Amendment violated Article V of

the United States Constitution on the extraordinary proposition that, under the Constitution,

> the people are not to play a direct role in the Article V amendment process.
>
> A. 22 n.12.

First, there is nothing in Article V that says this, and nothing in the decisions of this Court that would support such a sweeping and anti-democratic proposition. Especially given the Constitution's Preamble, and Amendments IX and X, a far more reasonable interpretation is that the people are expected to play whatever role in the amendment process they want to play so long as such role is not expressly prohibited. Surely, there is no express prohibition in the Constitution against the type of initiative measure approved by the voters of Missouri here.

Second, as University of Missouri law professor Kris W. Kobach has demonstrated in his scholarly work, and in the amicus brief he is submitting to this Court, the type of Instruct-and-Inform measure approved by the voters of Missouri has strong historical roots in the periods before, during and after the framing of the Constitution, and in the events leading to the passage of the Seventeenth and Nineteenth Amendments to the Constitution.

Third, as was the case with the passage of the Seventeenth and Nineteenth Amendments, direct voter involvement is essential when the reform sought is a reform against the vested interests of the voters' elected representatives. What Justice Kennedy said in his dissenting opinion in Nixon v. Shrink Missouri Government PAC, 120 S.Ct 897, 914, 915 (2000) regarding the type of decision of this Court which, by its nature, insulates itself from correction in the political process, applies with equal force to those features of our Constitutional system which, by their nature, tend to be insulated from correction in the political process. Those attributes of the electoral process which incumbent Congressmen would naturally regard as being at least in some part responsible for their election or their political power, such as the method of election (cf. the Seventeenth Amendment), the extent of the suffrage (cf. the Nineteenth Amendment), the means of financing election campaigns, the advantages of incumbency and the right to run for re-election, constitute perhaps the prime example of features of our political system which tend to be insulated from correction or amendment in the political process. This is because such correction or amendment cannot come about without the Congressmen themselves acting against their perceived self-interest, something which Congressmen, and people in general, are loathe to do. Accordingly, attributes of the electoral process, such as the right to run for re-election that was the subject of

the Missouri Initiative Amendment, must, in Justice Kennedy's words,

> never be viewed with more caution than when they provide immunity from their own correction in the political process and in the forum of unrestrained speech.
>
> 120 S.Ct at 915.

And, for the same reason, means to correct or amend such attributes of the electoral process, such as the Missouri Initiative Amendment at issue here, should be treated with deference, and decisions finding such means unconstitutional, such as the Eighth Circuit's opinion below, regarded with skepticism.

Conclusion

The judgment of the Court of Appeals for the Eighth Circuit must be reversed.

Dated: June 2000

Respectfully submitted,

David Jonathan Fine
Dangel & Fine, LLP
10 Derne Street, P.O. Box 9505
Boston, Massachusetts 02114-9505
(617) 557-4800

Counsel of Record for Amicus Curiae
U.S. PIRG Education Fund

D:\David Fine\USPIRG\Education Fund\Amicus.wpd

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

No. 99-929

In The

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE STATE OF NEBRASKA IN SUPPORT OF PETITIONER

DON STENBERG
Attorney General of Nebraska

L. STEVEN GRASZ
Deputy Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

MISSOURI'S INFORMED VOTER LAW IS WITHIN THE POWER OF A STATE TO REGULATE ITS ELECTION PROCESS AND DOES NOT USURP THE AUTHORITY OF CONGRESS OR THE STATE LEGISLATURES TO PROPOSE AMENDMENTS TO THE U.S. CONSTITUTION 3

A. Introduction 3

B. Missouri's Informed Voter Law is a Nonbinding Advisory Instruction to Legislators and Members of Congress Expressing the Collective Will of the People Regarding Term Limits 5

1. This case is governed by fundamental principles of federalism which dictate that a federal court must read Missouri's amendment as a nonbinding advisory expression of the will of the people to their elected representatives rather than as an unconstitutional attempt to bind legislators 6

2. Examination of the text of Article VIII shows that it is a nonbinding advisory instruction which does not mandate how legislators must vote 7

3. Examination of *Hawke v. Smith* reveals that Informed Voter Laws do not violate Article V 10

TABLE OF CONTENTS – Continued

Page

4. Article VIII does not eliminate legislative discretion 12

C. States Have Previously Used the Ballot to Provide Voters With Information Regarding a Candidate's Position on Constitutional Amendments 15

1. Introduction 15

2. Other states have used methods far more "coercive" than Article VIII in dealing with constitutional amendments 15

3. Widespread use of ballot language led to adoption of the Seventeenth Amendment... 17

D. Descriptive Ballot Language is Commonly Used Today by the States and Takes on Many Forms..... 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

AFL-CIO v. March Fong Eu, 686 P.2d 609 (Cal. 1984) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 13, 23

Burdick v. Takushi, 504 U.S. 428 (1992) 21

De Bartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 (1988) 7

Donovan v. Priest, 931 S.W.2d 119 (Ark. 1995).....8, 9

Eu v. San Francisco Democratic Central Committee, 489 U.S. 214 (1989) 21

Hawke v. Smith, 253 U.S. 221 (1920) 4, 10, 11, 15

Kimble v. Swackhamer, 439 U.S. 1385 (Rehnquist, Circuit Justice 1978) 5, 6, 14

Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) 5, 6, 9

In re Opinions of the Justices, 148 So. 107 (Ala. 1933) 16

Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997) ...8, 9

Socialist Workers Party v. Eu, 591 F.2d 1252 (9th Cir. 1978), cert. den., 441 U.S. 946 (1979) 13

State ex rel. Harper v. Waltermire, 691 P.2d 826 (Mont. 1984)..... 8

State v. Blaisdell, 118 N.W. 141 (N.D. 1908) 19

State v. Frear, 125 N.W. 961 (Wis. 1910).....19, 20

TABLE OF AUTHORITIES – Continued

Page

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 21

Twin Cities Area New Party v. McKenna, 73 F.3d 196 (8th Cir. 1996), rev'd on other grounds, sub nom. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) 22

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) ..3, 21

United States v. National Dairy Products Corp., 372 U.S. 29 (1963) 6

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 4, cl. 1 .....2, 21

U.S. Const. art. V..... 2, 9, 15

Mo. Const. art. VIII..... *passim*

Neb. Const. art. XVIII 12

Ariz. Rev. Stat. Ann. §§ 16-703(C), 16-704(A), 16-705(C) (1996) 16

Del. Code Ann. Title 15, § 7706 (Michie 1999)..... 17

Fla. Stat. Ann. § 107.04(1) (West 2000 Cum. Supp.) 17

Idaho Code Ann. § 34-2205 (Michie 1995) 17

Idaho Session Laws, House Bill No. 16 (1909)....11, 18

1909 Ill. Laws 46, 58-59..... 19

Ind. Code §§ 3-10-5-7 and 3-10-5-9 (LEXIS 1998) 17

Mont. Code Ann. § 13-26-103 (1999) 17

TABLE OF AUTHORITIES – Continued

Page

1909 Laws of Neb., Ch. 51, at 253 .....4, 10

1909 Neb. Laws, House Roll No. 1, Ch. 51..... 19

Ohio Rev. Code Ann. § 3523.04 (Anderson 1996) 17

S.D. Codified Laws § 2-15-4 (Michie 1992) 17

Utah Code Ann. § 20A-15-103 (LEXIS 1998)..... 17

Vt. Stat. Ann. Title 17, § 1814 (Equity 1982)..... 17

Wash. Rev. Code § 29.74.060 (1993) 17

MISCELLANEOUS

Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 3 n.1 (1999)..... 3

Ronald R. Rotunda, *The Aftermath of Thornton*, 13 Const. Comm. 201, 207 (Summer 1996)..... 11

INTEREST OF AMICUS CURIAE

The people of the State of Nebraska, like those in Alaska, Arkansas, California, Colorado, Idaho, Maine, Nevada, and South Dakota, have adopted a constitutional provision substantially the same as the Missouri law under review. The amicus curiae has an interest in upholding its democratically enacted fundamental law. The amicus curiae also has an interest in protecting the power of the States to prescribe the manner of holding elections; in preserving the authority and role of the States in our Union; and in upholding the right of the people to express their wishes to their elected representatives.

The amicus curiae agrees with the State of Missouri that this case "presents the Court with the most fundamental issue in a representative democracy: the right of the people to participate in their own governance." (Petitioner's Reply Brief to Brief in Opposition at 2). Regardless of how one views the particular issue which gave rise to the Missouri law and ones like it in other States, the right of the people to communicate their wishes to their elected representatives must be preserved.

SUMMARY OF ARGUMENT

This case concerns the right of the people to express their collective will to their elected representatives regarding a proposed amendment to the United States Constitution. The provision in question, as well as similar provisions in other States, expresses the will of the people as to the adoption of a federal term limits amendment.

Such provisions do not usurp the authority of the State legislatures or Congress to propose constitutional amendments or make application for a constitutional convention. The challenged provision is a nonbinding advisory instruction to State legislators and members of Congress expressing the collective will of the voters.

Neither Article V nor the Free Speech Clause of the First Amendment prevent voters from knowing precisely what position candidates have taken on a specific term limits amendment. Informing the electorate is a legitimate exercise of a State's power to regulate the content of its ballots. This Court has made it clear that the Constitution grants States broad power to prescribe the time, places and manner of holding elections for Senators and Representatives, U.S. Const., art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. The challenged amendment discloses information to the electorate about legislators' voting records, and does not eliminate legislative discretion or dictate how the legislators must vote.

ARGUMENT

MISSOURI'S INFORMED VOTER LAW IS WITHIN THE POWER OF A STATE TO REGULATE ITS ELECTION PROCESS AND DOES NOT USURP THE AUTHORITY OF CONGRESS OR THE STATE LEGISLATURES TO PROPOSE AMENDMENTS TO THE U.S. CONSTITUTION.

A. Introduction.

In 1995 this Court invalidated term limit amendments adopted by the voters of twenty-three (23) States. ***U.S. Term Limits v. Thornton***, 514 U.S. 779 (1995) (5 to 4 decision). The Court concluded that an amendment to the U.S. Constitution would be required before term limits could be imposed on members of Congress. ***Id.*** at 838. Subsequently, a movement to encourage adoption of such an amendment began nationwide. On November 5, 1996, the voters of the States of Alaska, Arkansas, Colorado, Idaho, Maine, Missouri, Nebraska, Nevada, and South Dakota approved Informed Voter Laws as amendments to their State Constitutions. ***See*** Kris W. Kobach, ***May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution***, 33 U.C. Davis L. Rev. 1, 3 n.1 (1999). In June of 1998 the voters of California approved a similar law. ***Id.*** These laws "instruct" state legislators and members of Congress to use the powers of their offices to support an actual Congressional term limits amendment to the United States Constitution. The laws also require the placement of statements on the next election ballot informing voters whether candidates have failed to take specific action supporting the federal term limits amendment. This

ballot language provision is similar to a method utilized by a number of States early in the last century to encourage adoption of the Seventeenth Amendment which instituted direct election of U.S. Senators. *See, e.g.*, 1909 Laws of Neb., Ch. 51, at 253.

Unlike other provisions invalidated since ***Hawke v. Smith***, 253 U.S. 221 (1920), the challenged Missouri provision (and similar provisions adopted by other States) does not employ financial penalties such as docking the salaries of dissenting legislators; nor does it proscribe, limit or mandate the terms of debate or deliberation on the proposed constitutional amendment. The internal "coercion" that a particular legislator may feel in response to public disclosure of information is beyond the pale of proper judicial inquiry. It is an inherently subjective and political question. It differs fundamentally from an objectively binding provision or one with penalties such as salary forfeiture. Furthermore, recent legislative history shows that the provision did not, in fact, override the discretion of its legislative opponents.

Under Missouri's law, as under similar provisions, ratification of the proposed constitutional amendment still depends on the vote of the State Legislatures. Legislators are free to vote however they deem appropriate. Their current term of office is not affected in any manner regardless of how they vote. No punitive measure of any kind is imposed during their term of office. The only consequence of failing to follow the voters' instructions is to have factual information placed on the ballot at the next election informing voters of the behavior of the candidates who are seeking a new term in office.

Extensive historical precedent involving the use of ballot language to inform voters of candidates' positions on constitutional amendments, including the Seventeenth Amendment, demonstrates that such expressions of popular will have never been thought to violate the U.S. Constitution. On the contrary, such expressions of the people's collective will are legitimate means by which to communicate with elected representatives in order to ensure government of the people, by the people, and for the people.

B. Missouri's Informed Voter Law is a Nonbinding Advisory Instruction to Legislators and Members of Congress Expressing the Collective Will of the People Regarding Term Limits.

It is not disputed that the people of a state may not bind their state legislators to apply for a constitutional convention. Conversely, it is also clear that a nonbinding advisory instruction regarding such a convention is valid. *See Kimble v. Swackhamer*, 439 U.S. 1385, 1386 (Rehnquist, Circuit Justice 1978); *Miller v. Moore*, 169 F.3d 1119, 1123-1124 (8th Cir. 1999). The key issue in this case, then, is whether Missouri's law is a mandatory provision that dictates how legislators must vote, or whether it is a nonbinding advisory instruction expressing the collective will of the people regarding how they wish their elected representatives to vote on an application for a convention for the purpose of adopting a proposed term limit amendment.

1. This case is governed by fundamental principles of federalism which dictate that a federal court must read Missouri's amendment as a nonbinding advisory expression of the will of the people to their elected representatives rather than as an unconstitutional attempt to bind legislators.

The threshold issue in this case is whether a federal court may strike down the fundamental law of a sovereign State where a construction of the challenged provision is fairly possible by which the constitutional doubts may be avoided. This Court has long adhered to a basic rule of construction, grounded in important considerations of federalism, that where two interpretations of a state statutory or constitutional provision are possible, a federal court must adopt the one which makes the provision constitutional. ***United States v. National Dairy Products Corp.***, 372 U.S. 29, 32 (1963).

Specifically, the issue here is whether Article VIII of the Missouri Constitution is a nonbinding advisory instruction to legislators and members of Congress expressing the wishes of the voters, or whether it is an unconstitutional usurpation of the legislature's authority with regard to applying for a constitutional convention.

The applicable law is clear. Advisory and nonbinding referenda on an amendment to the United States Constitution are valid. ***Kimble v. Swackhamer***, 439 U.S. at 1386. As long as the provision does not place any legal requirement on the legislature or any of its members, the communication by the people to their legislature does not improperly inject the citizenry into the amendment process. ***See Kimble***, 439 U.S. at 1386, 1387; ***Miller v. Moore***,

169 F.3d at 1123-1124. Thus, if Article VIII may be interpreted as a non-binding advisory instruction, it must be upheld.

The key language in Article VIII (the word "instruct") has two possible constructions, the first being that the provision is an impermissible attempt to bind legislators to propose and adopt a constitutional amendment, and the second being that the provision is a nonbinding advisory expression of the collective will of the people – an advisory communication between voters and their elected representatives. As discussed below, it is clear that it is fairly possible to construe Article VIII so as to avoid an unconstitutional result. Since this Court is obliged to presume an intent to act within constitutional bounds, the Court must read Article VIII as a nonbinding advisory communication between the people and their elected representatives. ***De Bartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council***, 485 U.S. 568, 575 (1988).

2. Examination of the text of Article VIII shows that it is a nonbinding advisory instruction which does not mandate how legislators must vote.

Opponents of the challenged provision argue that it is no different from a provision which cuts legislative salaries or forces perpetual legislative sessions if legislators fail to adopt a specific proposal. However, when one examines the actual text of Article VIII, it becomes clear this is not true.

Article VIII does not usurp the authority of Congress and State Legislatures. On the contrary, Article VIII is a nonbinding instruction to members of Congress and congressional candidates expressing the wishes of the State's voters. Under Article VIII, ratification of the proposed term limits amendment still depends on the vote of the State Legislatures. State representatives can (and do) still vote however they deem appropriate. Their term of office is not affected in any manner. Their salary is also not affected. ***Compare AFL-CIO v. March Fong Eu***, 686 P.2d 609 (Cal. 1984) (invalidating initiative calling for legislature to seek federal balanced budget amendment on penalty of loss of salary). No punitive measure of any kind is imposed during their term of office. No debate or deliberation is proscribed, limited or mandated. ***Compare State ex rel. Harper v. Waltermire***, 691 P.2d 826, 829 (Mont. 1984) ("The stricken ballot measure would compel the Legislature to reach a specific result under threat of confinement and no pay.").

The only consequence of failing to follow the voters' instructions under Article VIII is to have factual information placed on the ballot at the next election informing voters of the position of the candidates who are seeking a *new* term in office. Although the Arkansas Supreme Court characterized similar descriptive ballot language as "threatened political death." ***Donovan v. Priest***, 931 S.W.2d 119, 127-128 (Ark. 1996), the Supreme Court of Idaho held that a nearly identical provision in that State's Constitution does *not* violate Article V. ***Simpson v. Cenarrusa***, 944 P.2d 1372 (Idaho 1997). After striking the ballot language portions of the provision on state law grounds that are not at issue in the present case, the court held

that the instructions to Idaho's state and federal legislators regarding the proposed term limits constitutional amendment did not run afoul of Article V as they were nonbinding and advisory. The court stated, *"Members of Congress and legislators are not compelled to support the proposed amendment; they are free to act as they wish."* ***Simpson v. Cenarrusa***, 944 P.2d at 1376-1377. Consequently, it is clear that the term "instruct" in Article VIII may fairly be construed as nonbinding.

Furthermore, ***Donovan*** and similar decisions such as ***Miller v. Moore***, 169 F.3d 1119 (8th Cir. 1999), are simply incorrect. The U.S. Constitution does not protect politicians from the exercise of the voters' discretion or the voters' right to be informed of candidates' positions on specific constitutional amendments. The political effect of Article VIII, if any, relates only to a *future* term of office – something to which no candidate (incumbent or otherwise) has an entitlement. Informed Voter Laws may be compared to resign-to-run laws; laws prohibiting primary losers from running in the general election by petition; state term limit laws; campaign finance disclosure laws; political primary rules; minimum primary vote requirements, etc. As discussed in more detail below, this Court's decisions in this area do not forbid political consequences that result from disclosure of factual information to the public concerning candidates' positions on proposed amendments.

3. Examination of *Hawke v. Smith* reveals that Informed Voter Laws do not violate Article V.

Opponents of Article VIII argue that ***Hawke v. Smith***, 253 U.S. 221 (1920), must be read broadly to proscribe the "instruction" given to legislators. They describe Article VIII as an attempt to coerce legislators rather than as a non-binding advisory expression of the will of the people to their elected representatives. Such a reading of ***Hawke v. Smith*** is inappropriate for two reasons.

First, an expansive reading of ***Hawke v. Smith*** is inappropriate under applicable rules of construction as well as important principles of federalism. As discussed above, where two differing interpretations are possible, a court must favor a saving construction that renders the provision constitutional. Article VIII can fairly and accurately be read as a non-binding advisory instruction to legislators and members of Congress expressing the wishes of the voters. It does not force legislators to vote for anything. For example, a majority of Nebraska's Congressional Representatives, in fact, chose not to support the proposed term limits amendment. (Congressional Record – House, Feb. 12, 1997 H 489-512).

The second reason that ***Hawke v. Smith*** cannot be read as expansively as proposed by the Respondent is that expressions of popular will cannot be equated with usurping the constitutional authority of the Congress or State Legislatures. In ***Hawke v. Smith***, the Court discussed the impermissibility of ratification of constitutional amendments directly by the people rather than by

the Legislatures. *In support of its holding* that a "Legislature" is a representative body and does not include a referendum by the people, *the Court specifically referred to the process for the adoption of the recently ratified Seventeenth Amendment* which provided for the direct election of U.S. Senators: "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." ***Id.*** at 228. Although not readily apparent to many of those reading this statement 80 years later, this statement by the Court undermines the Respondent's position by exposing his mischaracterization of Article VIII. The legal significance of the Court's statement is clear upon review of its historical context.

As the Court was unquestionably aware, the *ratification of the Seventeenth Amendment was accomplished with the aid of numerous state laws similar to Missouri's Article VIII.* ***See, e.g.***, Oregon Primary Law, 1904; 1909 Laws of Neb., ch. 51, at 253; Idaho Session Laws, House Bill No. 16 (1909). *In fact, by 1912, 29 of the 48 states had provisions in place for selecting the popular choice for U.S. Senator. See* Ronald R. Rotunda, *The Aftermath of Thornton*, 13 Const. Comm. 201, 207 (Summer 1996).

In light of the Court's choice of the ratification of the Seventeenth Amendment as an *example* in ***Hawke***, it seems clear that *while the Court saw direct ratification of constitutional amendments by means of a popular referendum as impermissible, the Court viewed nonbinding "instructions" to legislators and ballot language provisions as being in a different category*. Thus, ***Hawke v. Smith*** not only fails to support the Respondent's position, but in fact reveals his mischaracterization of Article VIII. ***Hawke v. Smith***

shows that the provisions of Article VIII are in a different category from impermissible direct ratification provisions. Historical evidence supporting this reading of ***Hawke v. Smith*** is set forth in section IIC, ***infra***.

4. Article VIII does not eliminate legislative discretion.

The Respondent argues that Article VIII does not constitute advisory language expressing the will of the people, but rather is a mandatory and coercive requirement which forces and requires legislators to vote for a term limits amendment. However, assertions are one thing and facts are another. The Respondent's allegations are simply not true.

State representatives are not bound by Informed Voter Laws to vote in a predetermined way, and in fact they have exercised their individual judgment. For example, despite a constitutional provision nearly identical to Missouri's (Neb. Const. Article XVIII) the majority of Nebraska's delegation in the U.S. House of Representatives voted *against* the term limit amendment requested. (Congressional Record – House, Feb. 12, 1997 H 489-512).

In rejecting Missouri's view of the amendment as a nonbinding advisory provision, the Eighth Circuit found that the word "instructs" must be interpreted as mandatory in nature. This finding is erroneous for several reasons. More directive language is quite easy to draft. Mandatory terms such as "shall" and "must" are absent from the provision. Furthermore, there are no penalties for noncompliance. Finally, the Amendment clearly contemplates that some legislators will choose not to support

the proposed term limits provision. The amendment contains provisions regarding what happens when a legislator supports the proposal, and also when a legislator does not.

Some courts have found that the Informed Voter Laws produce "fear of stigmatization." To that conclusion, we can only demur. The "fear of stigmatization" is a political question outside the proper bounds of judicial inquiry in this context. Responsiveness to the wishes of the citizenry is central to representative democracy. Candidates may lose votes as a result of their public financial disclosures. Yet, the Court has upheld such disclosure requirements. ***Buckley v. Valeo***, 424 U.S. 1 (1976). The Eighth Circuit's conclusion ignores the fact that candidates may also lose votes because of political party affiliation labels. Yet, such labels have been upheld. Candidates may lose votes because they are labeled on the ballot with a designation other than the one they prefer. Yet, such laws are constitutional. ***Socialist Workers Party v. Eu***, 591 F.2d 1252 (9th Cir. 1978), cert. den., 441 U.S. 946 (1979).

The Eighth Circuit's conclusion is at odds not only with the real life facts, but also with common sense. It can hardly be assumed that voters would not be made aware of a candidate's position on term limits during a campaign, even in the absence of Article VIII. The votes of legislators are public records. Furthermore, failure of an elected official to follow voter instructions regarding term limits would cost the candidate votes at the polls only if the voters made that choice. This is the voters' right. Impermissible coercion, such as docking legislators' pay or confining legislators, cannot be equated with potential

political pressure arising from the provision of factual information to voters. Under Article VIII, as was the case in ***Kimble v. Swackhamer***, 439 U.S. at 1388, each member of the Legislature is still free to obtain the views of constituents in the legislative district which he represents, and vote accordingly.

The Respondent apparently believes that providing factual information to voters (at the voters' request) so that voters can intelligently exercise their elective franchise is a constitutional infringement. However, nothing in Article V or any other provision in the Constitution prohibits the people from expressing their collective will, and then holding their elected representatives accountable in future elections as to whether they acted to implement the people's wishes. ***Kimble v. Swackhamer***, 439 U.S. at 1387. Article VIII is an advisory provision expressing the will of the people. It does not mandate that legislators or members of Congress vote for the proposed term limits amendment.

The nonbinding nature of the provision is not a matter of conjecture, speculation or prognostication. As a matter of historical fact, a number of legislators, including, for example, a majority of Nebraska's Representatives in Congress, voted contrary to the allegedly "binding" instructions in the challenged provision. The legislators were, quite obviously, not "bound" by the provision.

C. States Have Previously Used the Ballot to Provide Voters With Information Regarding a Candidate's Position on Constitutional Amendments.

1. Introduction.

An examination of the process leading to the adoption of the Seventeenth and Twenty-first Amendments gives important insight into this Court's decision in ***Hawke v. Smith*** and also to the longstanding interpretation of Article V.

Article V of the United States Constitution has not historically been interpreted as prohibiting the placement of information on the ballot when such information relates to a constitutional amendment. The matter of candidates' positions on constitutional amendments has long been a vital component in American politics and has historically been part of the candidate selection process.

2. Other states have used methods far more "coercive" than Article VIII in dealing with constitutional amendments.

Other States have used methods far more "coercive" than Article VIII in dealing with constitutional amendments. For example, some States utilized ballot information to ratify the Twenty-first Amendment, which is the only amendment to the United States Constitution ratified by state conventions. The State of Alabama, for example, in order to ensure voting in accordance with the people's wishes on the passage of the Twenty-first Amendment, provided that those eligible to attend the convention for ratification must sign a pledge to abide by

the non-binding vote of Alabama's voters. This requirement was upheld in ***In re Opinions of the Justices***, 148 So. 107, 109-10 (Ala. 1933).

In other States as well, the procedures for nomination of delegates to ratifying conventions for amendments to the United States Constitution require candidates to include a statement in their petition regarding whether they oppose or favor ratification of the proposed amendment. In Arizona, for example, the nomination petitions must have a statement by the candidate that the candidate either favors or opposes ratification of the amendment to the U.S. Constitution. Furthermore, a delegate who is elected based on a platform or nomination petition statement favoring or opposing ratification must vote in accordance with that platform or statement at the convention; otherwise, that delegate is guilty of a misdemeanor, and the delegate's vote will not be considered. Ariz. Rev. Stat. Ann. §§ 16-703(C), 16-704(A), 16-705(C) (1996).

In the State of Washington, candidates for election as a delegate to a ratifying convention must file a "declaration of candidacy." This "declaration" must include a:

> sworn statement of the candidate that he is either for or against, as the case may be, the amendment which will be submitted to a vote of the convention and that he will, if elected as a delegate, vote in accordance with his declaration. The form shall be so worded that the candidate must give a plain unequivocal statement of his views as either for or against the proposal upon which he will, if elected, be called upon to vote.

Wash. Rev. Code § 29.74.060 (1993).[1]

The approach taken by States like Alabama with respect to the Twenty-first Amendment, and by States like Arizona and Washington with respect to ratifying conventions for constitutional amendments was not, and is not, unique. A similar technique was used by the States as a means of encouraging adoption of the Seventeenth Amendment.

3. Widespread use of ballot language led to adoption of the Seventeenth Amendment.

By the late 1800's, there was growing discontent among the people regarding the selection of United States Senators by State legislatures rather than directly by the people.

The State of Oregon established the precedent that other States followed when, in 1904, Oregon adopted a "direct" primary law through the people's Initiative and Referendum process. Upon being nominated, a candidate could also sign his name to one of two statements which

---

[1] For states with similar provisions *see* **Del**. Code Ann. Title 15, § 7706 (Michie 1999); **Fla**. Stat. Ann. § 107.04(1) (West 2000 Cum. Supp.); **Idaho** Code Ann. § 34-2205 (Michie 1995); **Ind**. Code §§ 3-10-5-7 and 3-10-5-9 (LEXIS 1998); **Mont**. Code Ann. § 13-26-103 (1999); **Ohio** Rev. Code Ann. § 3523.04 (Anderson 1996); **S.D**. Codified Laws § 2-15-4 (Michie 1992); **Utah** Code Ann. § 20A-15-103 (LEXIS 1998); **Vt**. Stat. Ann. Title 17, § 1814 (Equity 1982).

would appear on the ballot by the candidate's name. Statement Number 1 read:

> I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office, I shall always vote for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress without regard to my individual preferences.

Statement Number 2 read:

> During my term of office I shall consider the vote of the people of the United States Congress as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so seems to me to be sufficient.

Oregon Primary Law, 1904.

Moreover, in 1908, supporters of the direct election of Senators submitted another proposal to the people of Oregon by way of the Initiative. This bill stated:

> Be it enacted by the people of the State of Oregon: SECTION 1. That *we, the people of the State of Oregon, hereby* **instruct** our representatives and senators in our legislative assembly, as such officers, to vote for and elect the candidates for United States Senators from this State who receive the highest number of votes at our general election.

(emphasis added).

In addition to Oregon, the State of Idaho enacted a similar primary election law in 1909. Idaho Session Laws,

House Bill No. 16 (1909). Nebraska took a similar step in its primary election law when it allowed candidates for the state legislature to sign a Statement Number One or a Statement Number Two identical to Oregon's on their nominating petitions. Candidates who signed Statement Number One would have printed after their names, "Promises to vote for the people's choice for the United States Senator." The candidates who had signed Statement Number Two would have printed after their names, "Will not promise to vote for people's choice for United States Senator." 1909 Neb. Laws, House Roll No. 1, Ch. 51 at pp. 252-254 (codified at Cobbey's Annotated Statutes § 5906).

North Dakota had a similar provision. In ***State v. Blaisdell***, 118 N.W. 141, 145 (N.D. 1908), the North Dakota Supreme Court upheld the provisions of North Dakota's primary election law which allowed the voters of each party to express their choice for Senator. The court stated, "*It merely permits an expression of choice by the voters*, and its provisions, in effect, provide a convenient method of exercising the constitutional right of petition." ***Id.*** at 147 (emphasis added). ***See also*** 1909 Ill. Laws 46, 58-59.

Furthermore, in ***State v. Frear***, 125 N.W. 961 (Wis. 1910), the Wisconsin Supreme Court ruled that the Wisconsin primary law did not require the candidates to pledge themselves to support any particular nominee and should consider such information "advisory." The Wisconsin Supreme Court concluded that:

> ***Construing the law as imposing no legal obligation on the part of any member of the Legislature to vote for his party nominee at the***

> ***primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the Constitution has been transgressed.***

Id. at 972 (emphasis added).

These provisions adopted by the various States ultimately led to the proposal and ratification of the Seventeenth Amendment.

In sum, the people of the States have sometimes used ballot information in order to allow voters to cast informed votes on important issues. When the voters use ballot information that does not involve otherwise unconstitutional discrimination (i.e., race), it has been and should be permitted. The historical precedent established prior to the passage of the Seventeenth Amendment, as well as current State practice regarding the nomination of delegates to ratifying conventions, demonstrate that no constitutional barrier has heretofore been thought to prevent the people from requiring that information be provided to voters regarding candidates' positions on constitutional amendments.

D. Descriptive Ballot Language is Commonly Used Today by the States And Takes on Many Forms.

In analyzing the issue in this case, it is important to avoid confusing the unfamiliar with the unconstitutional. It should be noted that the very existence of a state-printed ballot is a legislative innovation of the States. As

this Court has pointed out, "until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888 . . . Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties." ***Burdick v. Takushi***, 504 U.S. 428, 446 (1992).

As to ballots for Congressional elections, U.S. Const. art. I, § 4, cl. 1 of the U.S. Constitution provides that States may prescribe "The Times, Places and Manner of holding Elections for [U.S.] Senators and Representatives. . . . " This provision expressly authorizes the States to regulate the manner of its elections for members of Congress. ***See Burdick v. Takushi***, 504 U.S. at 433. Under this provision, how States conduct their elections is within their discretion so long as they do not violate some other provision of the U.S. Constitution. ***See, e.g., U.S. Term Limits***, 514 U.S. at 834, ***Eu v. San Francisco Democratic Cent. Comm.***, 489 U.S. 214, 222 (1989).

Article VIII of the Missouri Constitution expressly states that its purpose is to "lead to the adoption" of a constitutional amendment. Mo. Const. art. VIII, § 15. It informs voters regarding candidates' behavior on Congressional term limits. States may generally enact ballot regulations which help the electorate make informed decisions. In fact, this Court has held that " *'there can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will. . . . '* " ***Tashjian v. Republican Party of Connecticut***, 479 U.S. 208, 220 (1986) (quoting ***Anderson v. Celebrezze***, 460 U.S. at 796) (emphasis added). Significantly, *the Court made this statement in the context of its discussion of the role*

of political party labels on election ballots. Political party labels are themselves a common form of descriptive ballot language. The Court noted that "to the extent that *party labels provide a shorthand designation of the views of party candidates on matters of public concern,* the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." ***Id.*** at 552 (emphasis added). ***See also Twin Cities Area New Party v. McKenna,*** 73 F.3d 196, 200 (8th Cir. 1996), rev'd on other grounds, sub nom. ***Timmons v. Twin Cities Area New Party,*** 520 U.S. 351 (1997) ("The Supreme Court has recognized that party labels provide a shorthand designation of the views of party candidates on matters of public concern. . . . ").

Many States have a long history of placing information on the ballot in addition to the candidates' names. Besides political party labels, States have sanctioned the placement of information on the ballot such as whether the candidate was endorsed by his or her political party convention, which Presidential contender the candidate supports, whether the candidate obtained ballot access by petition, and whether or nor the candidate has promised to vote for the people's choice for U.S. Senator. Never has a court stricken such ballot information until now.

It is important to remember that political parties are not part of our constitutional framework, and have no constitutional basis beyond the right of political association. Placement of party labels on ballots is a form of descriptive language meant to inform voters. Voters have long been accustomed to descriptive language such as "Democrat" or "Republican" following candidates' names. Some past political party names were even more

descriptive, such as "Free Silver," "Socialist Workers," "People's Independent," or "Prohibition." New party names are also often descriptive, such as "Reform" and "Green." A candidate could, if otherwise qualified, run on the "Term Limit" ticket or the "Experience Counts" ticket. Party names are intentionally chosen to convey a message to voters.

It is also significant that the Court has held that political candidates can be required by law to disclose where their campaign money comes from and how it is spent. ***Buckley v. Valeo,*** 424 U.S. 1, 66 (1976). Although this information is not currently printed on the ballot, it is nonetheless required by law to be supplied to voters for the purpose of assisting them in identifying the philosophy of the candidate. In this regard, the Court in ***Buckley*** stated, "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid voters in evaluating those who seek federal office. *It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels* and campaign speeches." ***Id.*** at 66-67 (emphasis added). Similarly, the Court stated, "In many situations the label 'Republican' or 'Democrat' tells a voter little." ***Id.*** at 70 (upholding campaign disclosure requirements in order to inform the voters of the interest that specific candidates represent).

It is quite possible that in the future voters will cast their votes using computer terminals at the polling places. Voters may well be able to access biographical information on the candidates, campaign finance disclosures, as well as the candidates' positions on major

issues. There is no constitutional prohibition against providing accurate information to the voters. This is true with regard to candidates' political party affiliation, their campaign contributions, and their status as either a party nominee or a petition candidate. It is also true regarding their position on major constitutional amendments such as the direct election of U.S. Senators and Congressional term limits.

The use of descriptive ballot language as provided by Article VIII is legally indistinguishable from party labels, and is intended to assist voters in making informed decisions.

CONCLUSION

Article VIII of the Missouri Constitution is a non-binding advisory instruction expressing the wishes of voters on a matter of public concern. It does not usurp the authority of Congress or State legislatures, and is within the authority of the States to prescribe the manner of elections. The Court should reverse the Eighth Circuit Court of Appeals and uphold the authority of the people of the States to communicate advisory instructions to their elected representatives.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska

L. STEVEN GRASZ
Deputy Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682

Counsel for Amicus Curiae

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

No. 99-929

In The

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE – THE INITIATIVE AND REFERENDUM INSTITUTE – IN SUPPORT OF THE PETITIONER

PATRICK T. O'BRIEN*
BUTLER, GLATER & O'BRIEN
811 S. 13th St.
Lincoln, Nebraska 68508
(402) 475-0881

JOHN M. BOEHM
LEGAL COUNSEL, THE INITIATIVE AND REFERENDUM INSTITUTE
811 S. 13th St.
Lincoln, Nebraska 68508
(402) 475-0881

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. ii

STATEMENT OF INTEREST OF AMICUS CURIAE ... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. BALLOT LABELS AND TERM LIMIT PLEDGES DO NOT COMPEL OR PUNISH SPEECH 3

A. Missouri's Article VIII Does Not Compel or Coerce Speech of Representatives or Candidates 4

B. Informational Ballot Labels Do Not Constitute Punishment of Representatives or Candidates 10

C. Representatives and Candidates Have Adequate Opportunity to Disassociate Themselves from the Pro-Term Limits Message 16

II. THE EIGHTH CIRCUIT ERRED IN APPLYING STRICT SCRUTINY RATHER THAN THE FLEXIBLE STANDARD OF REVIEW APPROPRIATE FOR WEIGHING FIRST AMENDMENT CHALLENGES TO ELECTION LAWS 19

III. EVEN IF ARTICLE VIII IS REVIEWED UNDER STRICT SCRUTINY, THE LAW SERVES A COMPELLING STATE INTEREST AND IS NARROWLY TAILORED TO SERVING THAT INTEREST 22

IV. MISSOURI'S ARTICLE VIII BALLOT LABEL IS ITSELF CORE POLITICAL SPEECH OF THE PEOPLE, PROTECTED BY THE FIRST AMENDMENT 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 20, 23

Anderson v. Martin, 375 U.S. 399 (1964) 23

Board of Regents of the Univ. of Wis. Sys. v. Southworth, 120 S. Ct. 1346 (2000) 28

Bramberg v. Jones, 20 Cal. 4th 1045, 978 P.2d 1240 (1999) 6

Buckley v. Valeo, 424 U.S. 1 (1976) 24, 26, 27

Burdick v. Takushi, 504 U.S. 428 (1992) 20, 21

County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) 9

Craig v. Harney, 331 U.S. 367 (1947) 8

Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999) ..... *passim*

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 16

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 11, 14

Lee v. Weisman, 505 U.S. 577 (1992) 8

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 13

Lynch v. Donnelly, 465 U.S. 668 (1984) 9

Marsh v. Chambers, 463 U.S. 783 (1983) 8

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 12, 13

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 27

TABLE OF AUTHORITIES – Continued

Page

New York Times v. Sullivan, 376 U.S. 254 (1964) 8, 16

Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) 13

Paul v. Davis, 424 U.S. 693 (1976) 10, 11, 14, 15, 18

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 16, 17

Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781 (1988) 14

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 27

Storer v. Brown, 415 U.S. 724 (1974) 21

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 20, 29

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 13

Wooley v. Maynard, 430 U.S. 705 (1977) 12, 13, 18

CONSTITUTIONS

Mo. Const. art. VIII ..... *passim*

U.S. Const. amend. I ..... *passim*

U.S. Const. preamble 24

U.S. Const. art. XIV § 1 21

LEGISLATIVE MATERIALS

143 Cong. Rec. E277 (daily ed. Feb. 13, 1997) (statement of Rep. Emerson) 6

1 *Annals of Cong.* 766 (Joseph Gales ed., 1789) 26

TABLE OF AUTHORITIES – Continued

Page

SECONDARY AUTHORITIES

Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349 (1999) 28

Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33 (1999) 28

Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1 (1999) 6, 25

Gordon S. Wood, *The Creation of the American Republic 1776-1787* (2d ed. 1998) 26

ELECTION MATERIALS

Sample Ballot & Voter Information Pamphlet, County of Alameda, Calif., Sept. 1, 1998 (Alameda County, Calif., Registrar of Voters) 7

Sample Ballot & Voter Information Pamphlet, County of Alameda, Calif., Feb. 2, 1999 (Alameda County, Calif., Registrar of Voters) 7

Alameda County Special Primary Election, Sept. 1, 1998, Summary Report (Alameda County, Calif., Registrar of Voters (Sept. 4, 1998)) 11

Alameda County Special Primary Election, Feb. 2, 1999, Summary Report (Alameda County, Calif., Registrar of Voters (Feb. 4, 1999)) 12

STATEMENT OF INTEREST OF AMICUS CURIAE

The Initiative and Referendum Institute is a non-profit, non-partisan, education and research organization that promotes and defends the initiative and referendum process.[1] The mission of the Initiative and Referendum Institute is to study the mechanisms of direct democracy, develop clear analyses of the strengths and weaknesses of various systems, and disseminate that information as broadly as possible. The Institute seeks to educate the public about the initiative process and its effects on the political, fiscal and social fabric of our society. The Institute also endeavors to provide effective leadership in litigation – defending the initiative and referendum rights of citizens against legal challenges that would seek to weaken or abolish such rights.

The Institute has filed this brief to defend the amendments to Article VIII of the Missouri Constitution that were passed by popular initiative on November 5, 1996 (hereinafter "Article VIII"), because the voters of Missouri have used the initiative to reinforce the role of citizens in the process of constitutional transformation. The instruction of representatives and the provision of information to voters regarding representatives' voting records allows citizens to press for necessary reforms and to effectively participate in democratic government. This case also implicates another right of paramount importance

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, or its members, made a monetary contribution to the preparation and submission of this brief.

in any democratic republic – the right of the people to speak collectively through their government. Because the Institute is particularly interested in ensuring that the First Amendment continues to protect the initiative and referendum process, this brief is limited to the First Amendment issues presented in this case.

SUMMARY OF ARGUMENT

This case involves two competing free speech claims, the right of the people to speak through their government versus the right of representatives and candidates to avert the supposed negative consequences of this speech. The Eighth Circuit erred by failing to give due weight to the right of the people to speak collectively. The Eighth Circuit also erred in holding that Article VIII unconstitutionally compels the speech of representatives and candidates. For a compelled speech violation of the First Amendment to exist, the following three elements must be present: (1) the actions of the state must demonstrably compel or coerce speakers to express a particular point of view, (2) the coercion of speech must be enforced by some punishment or penalty, (3) the speaker must be deprived of adequate opportunity to disassociate himself from the message that the state would have him bear. The Eighth Circuit erred in concluding that the first two elements existed; and it did not even consider the third element. The empirical evidence regarding the effects of ballot labels strongly suggests that they are not coercive. Moreover, the Supreme Court has acknowledged that merely being stigmatized by state speech, without more, is not a penalty violative of the First Amendment.

The Eighth Circuit also erred in holding that official commentary by the state on a candidate's behavior is a severe restriction on First Amendment rights that necessitates strict scrutiny. Rather, as a reasonable, nondiscriminatory ballot law, Article VIII should be subjected to the less exacting test of whether it serves an important regulatory interest of the state. Moreover, even if Article VIII were found to be a severe restriction, triggering strict scrutiny, it would withstand such scrutiny. The state's interest in fostering an informed electorate is a compelling one, as is the interest of Missouri citizens in pressing for constitutional reform to increase the integrity of elected officials. Article VIII is narrowly tailored to serve these interests, as it is the only practical way to counter the deceptive tactics practiced by candidates and incumbent representatives on the term limits issue.

The people of Missouri also have a collective right under the First Amendment to speak regarding the conduct of representatives and candidates. The Supreme Court has acknowledged that such speech rights of the majority exist. Furthermore, because the ballot is the state's property, the state retains a substantial amount of discretion over what speech occurs on it.

ARGUMENT

I. BALLOT LABELS AND TERM LIMIT PLEDGES DO NOT COMPEL OR PUNISH SPEECH

The U.S. Court of Appeals for the Eighth Circuit treated Missouri's Article VIII instruct-and-inform law as an instance of compelled speech, holding that it violated the First Amendment rights of political candidates.

Gralike v. Cook, 191 F.3d 911, 917-21 (8th Cir. 1999). However, the Eighth Circuit failed to adequately consider all of the issues that must be addressed in establishing a claim of government compulsion of individual speech. For a compelled-speech violation of the First Amendment to exist, the following three elements must be present: (1) the actions of the state must demonstrably compel or coerce speakers to express a particular point of view, (2) the coercion of speech must be enforced by some punishment or penalty, (3) the speaker must be deprived of adequate opportunity to disassociate himself from the message that the state would have him bear. In this case, the Eighth Circuit erred in concluding that the first two elements existed; and it did not even consider the third element.

A. Missouri's Article VIII Does Not Compel or Coerce the Speech of Representatives or Candidates

At the outset, it must be noted that the Eighth Circuit's description of what Article VIII requires is somewhat misleading. Article VIII does not "force candidates to speak in favor of term limits." *Id.* at 917. With respect to incumbent candidates, Article VIII is in no way concerned with what the candidate *says*. It is solely concerned with how the candidate votes and follows other procedural instructions. An incumbent candidate need not ever mention the phrase "term limits" in order to avoid the ballot label. He may even speak openly against term limits and urge all of his fellow representatives to vote against term limits, while casting his own vote in

accordance with his instructions. Although the instructions contained in Article VIII direct representatives to vote a particular way and to take certain procedural actions, the instructions do not urge representatives to say anything or to espouse any point of view. Similarly, a non-incumbent candidate may choose to say nothing about term limits or to speak stridently against term limits without triggering the ballot label. He need only sign a pledge to take certain actions in order to follow the peoples' instructions. Although there may be an element of protected speech in the casting of a vote or the signing of a pledge, Article VIII in no way compels a candidate to publicly advocate a point of view.

At the core of the Eighth Circuit's compelled speech holding is the assumption that the Article VIII ballot labels would actually operate to coerce the speech of candidates. "The ballot labels are a serious sanction, which we believe is sufficient to coerce candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot." *Id.* at 919. However, the Eighth Circuit provided no evidence of any sort to support this assumption. The Court was apparently unaware that empirical evidence was available. Instead, the Eighth Circuit offered a mere guess as to how the labels might affect the behavior of politicians in the real world.

The Eighth Circuit guessed wrongly. If, as the Eighth Circuit supposed, the Article VIII ballot labels were sufficiently coercive, one would assume that candidates would be unable to resist the pressures created by the labels. In fact, the available evidence indicates that candidates were quite willing to disregard their Article VIII instructions. In February 1997, Missouri Congressional

Representative Jo Ann Emerson not only voted contrary to her instructions, she declared on the floor of the House her intention to do so, stating, "if that means I invoke a misleading scarlet letter, so be it." 143 Cong. Rec. E277 (daily ed. Feb. 13, 1997) (statement of Rep. Emerson).[2] She was not the only member of Congress who expressed the view that disregarding the instructions was a perfectly feasible option. Florida Representative Bill McCollum urged Members of Congress from the nine states operating under similar instruct-and-inform laws to vote contrary to their instructions and to "take the risk and the chance of facing up to [term limits advocates]." *Id.* at H420. Plainly, these representatives did not regard the ballot labels to be particularly coercive.

If the Eighth Circuit's assumption were correct, one would also expect non-incumbent candidates operating under instruct-and-inform laws to be coerced into signing the term limits pledge. Here again, the empirical evidence indicates the contrary. In 1998 and 1999, the state of California held three special elections to fill vacant state legislative seats. The elections were held in the wake of California's Proposition 225 instruct-and-inform law, which was adopted by California voters on June 2, 1998.[3] These three elections provide the only existing evidence regarding the effect of an instruct-and-inform law on

---

[2] *Cited in* Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 24 n.93 (1999).

[3] The California law is, in all relevant respects, virtually identical to Missouri's Article VIII. *See Bramberg v. Jones*, 20 Cal. 4th 1045, 1050-53, 978 P.2d 1240, 1243-45 (1999).

non-incumbent candidate behavior. The effect was not at all what the Eighth Circuit supposed it to be. In California's Ninth District special primary election for the office of State Senator, held on September 1, 1998, four of the five candidates refused to sign the term limits pledge and consequently received the ballot labels by their names. *Sample Ballot & Voter Information Pamphlet, County of Alameda, Calif., Sept. 1, 1998* (Alameda County, Calif., Registrar of Voters). In the February 2, 1999, Sixteenth District special primary election for State Representative, three of the four candidates refused to pledge to support term limits and ran with the ballot labels by their names. *Sample Ballot & Voter Information Pamphlet, County of Alameda, Calif., Feb. 2, 1999* (Alameda County, Calif., Registrar of Voters). The third election was the general election in the Sixteenth District, between two candidates already counted. Of the nine candidates running for office in the two primary elections, only two took the pledge to support term limits. The overwhelming majority of candidates, seven of nine, withstood the supposedly coercive threat of the ballot label. Thus, the available empirical evidence strongly suggests that the ballot labels do not have a coercive effect on candidates' decisions to sign the pledge or not.

Article VIII involves commentary by the people on an incumbent candidate's voting record or on a non-incumbent candidate's silence. As described above, this commentary did not exert a coercive effect on candidate behavior in practice. But is the effect coercive in theory? Although this case presents a novel question in the area of compelled speech, there are relevant precedents that consider the coerciveness of government speech in other

contexts. In such cases, the Supreme Court has taken into account the fortitude of the individua! who must endure the speech. For example, in the case of *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court rejected the argument that having legislators endure the religious speech of a state chaplain violated the Establishment Clause. In so holding, the Court noted that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' . . . or peer pressure. . . . " *Id.* at 792 (internal citations omitted). In contrast, where the individuals exposed to public prayer are minors, the Court has acknowledged that they may be more susceptible to coercion: "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity. . . . " *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

In the present case, the candidate, in addition to being an adult, is also a public figure. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court recognized that public figures are expected to endure a greater amount of coercive or derogatory speech than are ordinary citizens.

> If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' *Craig v. Harney*, 331 U.S. 367, 376 (1947) . . . , surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

376 U.S. 254, 273. The same reasoning applies in the present case. Candidates for public office are adults who choose to enter the treacherous, turbulent waters of political campaigns and elections. *See id.* at 273, n.14. A thick

skin is required. Candidates are expected to take and defend positions on a wide range of issues, many of which they would probably rather not discuss. Candidates for public office must also endure criticism from a variety of sources. Clearly, this type of individual may be expected to withstand many influences, including commentary by citizens in the form of a ballot label. With this consideration in mind, it is not surprising that seven out of nine candidates in the California elections brushed the pledge aside even though they would face the ballot labels. Given the type of individuals involved, the ballot labels cannot be assumed to be inherently coercive.

The Eighth Circuit found the labels to be "particularly harmful because they appear on the ballot, an official document produced by the state." *Gralike*, 191 F.3d at 918. Government property, however, is regularly made a vehicle for speech of the majority. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding display of creche on government property); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (upholding display of menorah on government property). In *Lynch*, the Court noted the long history of executive orders and other official announcements by Presidents and Congress proclaiming Christmas and Thanksgiving National Holidays in religious terms. *Id.* at 676. The Eighth Circuit supposed that the ballot labels would create the impression of official disapproval, because they appear on state-produced documents. *Gralike*, 191 F.3d at 918-19. By this logic, the mere fact that the creche in *Lynch* was displayed on government property would have created a public impression of official approval of Christianity.

B. Informational Ballot Labels Do Not Constitute Punishment of Representatives or Candidates

The Eighth Circuit contended that a ballot label commenting on a candidate's decision not to take a term limits pledge amounted to punishment: "we believe that the Missouri Amendment in fact threatens a penalty that is serious enough to compel candidates to speak – the potential political damage of the ballot labels." *Gralike* at 918. This conclusion is flawed analytically, empirically, and as matter of precedent.

Analytically, the Eighth Circuit failed to precisely identify the source of the "penalty" faced by a candidate. The primary penalty that the candidate fears, and presumably seeks to avoid, is electoral defeat. However, under Article VIII, the state does not respond to a refusal to pledge by handing the candidate electoral defeat. Rather, the state provides factual information to the voters. The penalty, if it occurs, is not delivered by the state. The penalty is the result of a series of unconcerted private choices by citizens in the voting booth. Thus, private citizens administer the penalty. And they do so without any certainty that the penalty will actually occur when the votes are counted.

The distinction between the state imposing a penalty and the state providing information that may or may not lead to the private imposition of a penalty is a critical one. The Court has recognized that the Constitution affords individuals little protection against such privately-imposed penalties. In *Paul v. Davis*, 424 U.S. 693, 706 (1976), the Court held that the labeling of a person as an "active shoplifter" is not a punishment by the state

sufficient to trigger procedural or substantive due process protection. This labeling informed private decisions that severely inhibited the plaintiff's ability to enter businesses or obtain employment. *Id.* at 697. However, the Court recognized the distinction between public and private punishment, quoting Justice Jackson's concurrence in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), where he dismissed the consequences resulting from being designated a "subversive" as "sanctions applied by public disapproval, not by law." *Paul*, 424 U.S. at 703-704 (*citing McGrath*, 341 U.S. at 183-184). The same may be said in the present case. An electoral loss suffered by a candidate would be the result of public disapproval expressed at the polls, not a legal penalty imposed by the state.

Empirically, the conclusions of the Eighth Circuit are deeply flawed. The Eighth Circuit not only supposed that few candidates would risk not signing the pledge (an incorrect assumption, as discussed above), but also assumed that those who did take the risk would suffer grave "political damage." *Gralike*, 191 F.3d 918. Once again, the Eighth Circuit's unsupported assumption about electoral behavior was well off the mark. The available empirical evidence indicates that the ballot labels are not determinative of election outcome. In two of the three special elections in California in 1998 and 1999, the winners were candidates who had refused to take the term limit pledge and who received ballot labels next to their names. In the Ninth District special primary election for State Senator, the winner was Don Perata, who had declined to take the pledge and had received a ballot label under his name. *Alameda County Special Primary*

Election, Sept. 1, 1998, Summary Report (Alameda County, Calif., Registrar of Voters (Sept. 4, 1998)). And in the Sixteenth District special primary election for State Representative, the winner was Elihu Harris, who also had refused to take the term limit pledge and had received a ballot label under his name. *Alameda County Special Primary Election, Feb. 2, 1999, Summary Report* (Alameda County, Calif., Registrar of Voters (Feb. 4, 1999)). This empirical evidence suggests strongly that, in the real world, the Article VIII ballot label is not determinative of electoral outcome. Indeed, party labels, which are mandated on ballots across the country, correlate much more closely with victory or defeat at the polls. The Eighth Circuit made an evidently erroneous assumption when it linked the Article VIII ballot labels to defeat at the polls. This assumption is critical to the Eighth Circuit's holding. Without a significant probability of defeat at the polls, there is no penalty – not even one imposed by individual private citizens.

The Eighth Circuit's analysis of the relevant Supreme Court precedents in this area is also flawed. For a compelled speech claim to be valid, there must be some penalty or punishment that forces the individual to speak. *See Wooley v. Maynard*, 430 U.S. 705, 707-708 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). Indeed, it is difficult to imagine how speech could be "compelled" without the threat of some sort of sanction to do the compelling.[4] Yet, the Eighth Circuit

[4] Of course, compulsion can be produced with a carrot, as well as a stick. However, it seems rather unlikely that a constitutional violation would be found where a state rewarded

asserted that "compelled speech has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction." *Gralike*, 191 F.3d at 918. In support of its contention, the Eighth Circuit misleadingly quoted *Miami Herald*, 418 U.S. at 258: "Even if a newspaper would face no additional costs to comply . . . the Florida statute [compelling speech] fails to clear the barriers of the First Amendment. . . . " *Gralike*, 191 F.3d at 918. However, the reason that the additional cost was irrelevant was because, under the Florida statute, editors of newspapers that did not allow criticized political candidates a right of reply already faced civil liability and the possibility of being charged with a first-degree misdemeanor. *Miami Herald*, 418 U.S. at 244. The compulsion generated by such penalties was an "intrusion into the function of editors." *Id.* at 258. Criminal prosecution and exposure to civil liability is precisely the type of tangible punishment that the First Amendment prohibits. Nothing in *Miami Herald* suggested that ethereal "penalties," like ballot labels, should trigger First Amendment scrutiny.

The Eighth Circuit's references to compelled speech cases are largely inapposite to the case at hand. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Miami Herald*, 418 U.S. 241 (1974); *Wooley*, 430 U.S. 705 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S.

a select few citizens who spoke as directed by the state. The "compelled" speaker would be better off after speaking, and the rest of the citizenry would have experienced no infringement of their speech rights.

507 (1991); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). Whether it was expulsion, revocation of a utility monopoly or license, or some financial or criminal penalty, in all of the cited cases the speaker faced tangible punishment. Unlike the laws at issue in those cases, Article VIII merely requires the candidate to endure a message describing his official conduct. This can hardly be regarded as a punishment. If so, it is a punishment endured daily by public officials across the nation. Most political entities in the United States publicize the votes of office-holders and the political contributions made to candidates. Where controversial issues and large contributions are concerned, the dissemination of this information is a source of some consternation to politicians. But it is necessary to encourage responsible behavior by elected representatives.

The Supreme Court has never found a violation of the First Amendment where a state responds to the actions of individuals by communicating information on state property. In *Paul*, the Court held that the distribution of flyers identifying the plaintiff as an "active shoplifter" did not constitute a punishment by the state sufficient to trigger procedural or substantive due process protection. 424 U.S. at 706 (1976). Despite the stigma of being branded an "active shoplifter," the Court rejected the claim that the state may not publicize a record of an official act such as an arrest. *Id.* at 713. Voting records of representatives, like arrests, are official acts that the state has a right to publicize. Although *Paul* was decided on substantive and procedural due process grounds, the Court indirectly addressed the First Amendment. In *Paul*, the Court reviewed the many opinions written by the Justices in *Joint Anti-Fascist Refugee Comm.*

v. McGrath, 341 U.S. 123 (1951). In *McGrath*, the Court considered whether the Attorney General, purporting to act in pursuance of an Executive Order, could designate certain groups as "communist" or "subversive." The Court in *Paul* approvingly quoted Justice Reed's dissent in *McGrath*, in which he argued that a stigmatizing designation of an organization by the state, without more, did not "subject them to any punishment or deprive them of liberty of speech or other freedom." *Paul*, 424 U.S. at 704 (*citing McGrath*, 341 U.S. at 202). The clear import of *Paul* is that merely being stigmatized by the state is not a penalty of constitutional dimension. Moreover, being labeled an "active shoplifter," or "subversive" is undoubtedly more mortifying than being labeled an opponent of term limits.

It may be argued that Article VIII creates a state-inflicted stigma coupled with a loss of employment, which *Paul* suggested is a penalty serious enough to trigger constitutional protection. *Id.* at 701. However, losing an election is more analogous to not being hired than to being fired. And candidates certainly have no constitutional right to be elected. Plus, as noted above, electoral defeat would not be the result of state action, but rather the result of a series of unconcerted private choices by individual citizens at the polls.

Paul also required a connection between the state-imposed stigma and the loss of employment. *Id.* at 709. If *Paul* is the standard, the respondent should be required to demonstrate some nexus between the ballot label and losing the election. This standard would require the polling of voters in an attempt to determine whether a majority was persuaded by the ballot labels to vote against the

candidate. This standard, however, draws too much of an analogy between normal employment and holding elected office. Plainly, there are pronounced differences between the two situations.[5] Moreover such an analogy completely ignores the necessary interplay of free speech and voting that is essential in a democratic republic. To the extent that speech about a candidate leads to voter retribution against the candidate, it is a consequence that the First Amendment contemplates. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (*citing Stromberg v. California*, 283 U.S. 359, 369 (1931)).

C. Representatives and Candidates Have Adequate Opportunity To Disassociate Themselves From the Pro-Term Limits Message

The Court, in evaluating whether a person has been compelled to speak, has considered the degree to which the "objectionable" message will be associated with the person and whether the person can disavow any connection with the message. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 576-77

---

[5] For example, employees can expand their prerogatives and powers by bargaining with employers, whereas representatives cannot; and representatives are chosen to govern those who choose them, whereas employees rarely exercise authority over their employers.

(1995). In *PruneYard*, the Court reviewed whether a state constitutional provision protecting the right of high school students to distribute pamphlets in a shopping mall unconstitutionally compelled the speech of the shopping mall owner. The Court held that an owner of a shopping mall could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.* at 87.

In the present case, a candidate can easily disassociate himself from the state's message. There is nothing to prevent the representative from denouncing term limits. He can sign the pledge while publicly declaring that congressional term limits are undesirable. He can state his opposition to term limits in every speech that he gives and in every piece of campaign literature that he produces. He can reiterate his opposition to term limits in the myriad questionnaires that he receives from newspapers and interest groups. Similarly, an incumbent candidate can easily disassociate himself from the pro-term-limits message while still following his instructions from the voters of Missouri. He can cast his vote for term limits and simultaneously explain to the public that he is only doing so in order to comply with the people's instructions. He can loudly criticize any term limits proposal, and he can even urge his fellow legislators to vote against term limits. There are innumerable opportunities for candidates to state their position on the term limits issue. Because Article VIII in no way affects what a candidate says and what he declares his position on term limits to be, disassociation from the pro-term-limits message is easily achieved.

The Eighth Circuit also attempted a slight twist on the compelled speech argument. It suggested that if a candidate resists his instructions and declines to sign the pledge or vote in favor of term limits, then the label that failed to compel him becomes compelled speech itself. In other words, voters who read the message, "Declined to pledge to support term limits," will ascribe to the candidate the view that he does not support term limits. That, according to the Eighth Circuit, is also compelled speech. *Gralike*, 191 F.3d at 919.

However, this theory collapses quickly under its own weight. If it is unconstitutional for the state to speak about an individual whenever that speech has the effect of encouraging others to (correctly or incorrectly) ascribe a point of view to that individual, then some rather absurd conclusions must follow. A state could not print party labels below candidates' names on ballots. The label "Independent" placed below the name of a candidate who did not wish to declare a party might cause voters to assume that the candidate is a moderate, when in fact he is not. An incumbent governor (the spokesman for the state) could not speak about his opponent in an upcoming election. After all, such speech might cause voters to misunderstand what his challenger's views really are. Moreover, under the Eighth Circuit's theory, the state in *Paul* would be deprived of its right to distribute flyers identifying someone as an "active shoplifter," because people might incorrectly ascribe to the identified person the view that he enjoys shoplifting, when in fact he dislikes it. Or consider Justice Rehnquist's hypothetical billboard in *Wooley*, 430 U.S. at 721 (1977) (Rehnquist J., dissenting) (arguing that state-sponsored billboard

proclaiming "Live Free or Die" would not compel speech). Presumably, the state could permissibly erect a billboard displaying the caption, "Disregarded Voters' Instructions on Term Limits," followed by a list of candidates' names. Under the Eighth Circuit's compelled speech theory, however, persons viewing this billboard might ascribe a point of view to a candidate and thereby compel the speech of the candidate. Plainly, the Eighth Circuit's definition of compelled speech encompasses far too much activity.

II. THE EIGHTH CIRCUIT ERRED IN APPLYING STRICT SCRUTINY RATHER THAN THE FLEXIBLE STANDARD OF REVIEW APPROPRIATE FOR WEIGHING FIRST AMENDMENT CHALLENGES TO ELECTION LAWS

In deciding which standard of review to apply in this case, the Eighth Circuit asserted simplistically that because speech is regulated and because Article VIII is "content-based," then strict scrutiny applies. *Gralike*, 191 F.3d at 919-920. However, this reasoning predicates two debatable assumptions. The awkward language used by the Eighth Circuit belies this difficulty: "the Amendment burdens candidates' right to free expression by compelling them to state or act in such a way as to *portray a position* on the § 16 term limits proposal." *Id.* at 919 (emphasis added). As noted above, Article VIII does not restrict a candidate in the position that he "portrays." He may speak adamantly against term limits while acting in accordance with the voters' wishes, he may say nothing, or he may disregard his instructions with the knowledge

that voters will be informed of his action. Article VIII does not entail any scrutiny of the candidate's speeches or statements about term limits. It looks solely at the candidate's voting, or in the case of a non-incumbent, his decision whether to pledge to vote a certain way in the future. The second dubious assumption in the Eighth Circuit's reasoning is that Article VIII "is content-based because it addresses the issue of term limits, completely ignoring all other issues." *Id.* at 919-920. The mere fact that Article VIII is limited in scope to the term limits issue does make it a content-based law. By this reasoning, a more comprehensive instruct-and-inform law covering every imaginable issue would not be content-based.

However, even if the Eighth Circuit's two assertions were correct, Article VIII would not automatically be placed under strict scrutiny. The Supreme Court has produced a substantial body of case law concerning the regulation of the content of election ballots. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding a state's ban on multi-party, or "fusion" candidates); *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding a state law that completely prohibited write-in votes in primary and general elections); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down a state's early filing deadline for independent candidates for President). In such cases, individuals challenging the ballot regulations have asserted First Amendment rights. The Court has acknowledged that with elections, there inevitably must exist a significant amount of regulation as to what is printed on ballots. The Supreme Court has recognized the danger of voter confusion and candidate fraud that might otherwise occur: "As a practical matter, there must be a substantial

regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The Court's understanding that it must allow the states room to regulate the content of election ballots has led it to articulate a specialized form of analysis in such cases. A sliding scale is used when scrutinizing candidates' First Amendment claims in this context. Courts must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate 'against' the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (*citing Anderson*, 460 U.S. at 789). The appropriate level of scrutiny depends on whether the regulation is a "severe" restriction or a "reasonable, nondiscriminatory restriction" of First and Fourteenth Amendment rights. *Id.* If it is the former, strict scrutiny is applicable; if it is the latter, the state need only present an "important regulatory interest" to justify the restriction. *Id.*

It cannot be seriously contended that a mere ballot label that conveys information to voters constitutes a "severe" restriction on the exercise of First and Fourteenth Amendment rights. At worst, the ballot label is an inconvenience to representatives who would rather not have their conduct brought to the attention of voters. As noted above, it in no way restricts what the candidate may say about term limits or any other issue. Nor does it discriminate against any class of candidates: each candidate may choose whether or not to take actions triggering the label, just as he may choose his party. In weighing

this tenuous injury against the interest of the state in communicating information about elected officials to voters, the state's interest clearly outweighs the rights of the respondent. The people of Missouri decided that term limits is an important enough constitutional reform to necessitate instructions to candidates and representatives. Because candidates may easily obscure their voting and their position on this issue, the people of Missouri deemed it necessary to provide factual information on the ballot about candidates' actions. They decided that having that information on the ballot was just as useful as knowing the candidate's party. It was more useful than knowing the candidate's occupation or city of residence – information provided on many ballots across the country. Because there is no severe restriction on the First Amendment rights of the candidate, and the state has an important interest in communicating this information to voters, Article VIII survives the appropriate First Amendment scrutiny.

III. EVEN IF ARTICLE VIII IS REVIEWED UNDER STRICT SCRUTINY, THE LAW SERVES A COMPELLING STATE INTEREST AND IS NARROWLY TAILORED TO SERVING THAT INTEREST

Even if Article VIII were to be considered a severe restriction on First Amendment rights and strict scrutiny were to be applied, it would withstand such scrutiny. The citizens of Missouri expressed at least two compelling interests when they voted to enact Article VIII: an interest in informing themselves about the actions of their elected representatives, and an interest in enacting the reforms embodied in a congressional term limits amendment.

With respect to the first interest, the Supreme Court has recognized the importance of providing information to voters. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expression of the popular will in a general election." *Anderson*, 460 U.S. at 796. Although the Court in *Anderson* only acknowledged that the state's interest in fostering informed voting was "important and legitimate," without considering whether the interest rose to the compelling level, *id.*, there can be little doubt that voters have a compelling interest in demanding information that they deem relevant regarding candidates for political office.[6] Such information is essential to the vitality of representative democracy. Without it, elections become little more than a charade, devoid of meaningful expression of voter preferences.

The second compelling interest possessed by the citizens of Missouri is their interest in pressing for a constitutional reform that they favor. The U.S. Constitution contemplates that "We the People" have some role in its

---

[6] The obvious exception to this principle would occur where a state printed on the ballot information identifying a candidate's race, which the Court has held to violate the Equal Protection Clause of the Fourteenth Amendment. *Anderson v. Martin*, 375 U.S. 399 (1964). In the present case, however, the Equal Protection Clause does not operate to shield candidates who decline to sign the term limits pledge. If it did, then the provision of party information on ballots would be similarly vulnerable to Equal Protection challenge. In many states and cities, one political party enjoys overwhelming public support. In such environments, candidates who identify themselves with a disfavored party would undoubtedly prefer that party information not be displayed on the ballot.

creation and amendment. U.S. Const. preamble. In order to secure the constitutional reform that they seek, Missouri citizens must direct their representatives to act on their behalf. Reformers who favor term limits often point to the corrupting influence that long congressional terms exert on office holders. Regardless of whether the reformers have come up with an effective cure for the corruption that they perceive, they have a compelling interest in attempting to improve the integrity of the political system. A similar state interest was present in *Buckley v. Valeo*, 424 U.S. 1 (1976). In that case, the Court found that the public interest in reducing the appearance of corruption in representative government was a sufficient interest to override First Amendment concerns regarding campaign contribution limits. *Id.* at 27. "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26. In enacting Article VIII, Missouri voters expressed their belief that long incumbency also undermines the integrity of our system of representative democracy. Whether they are correct or not, they have a compelling interest in pursuing the reform that they desire.

Article VIII is narrowly tailored to serving these compelling interests. The Eighth Circuit credulously suggested that voluntary programs, such as debates and voter information guides, could adequately serve the voters' interest in obtaining information regarding the candidates' support for congressional term limits. *Gralike*, 191 F.3d at 921. This suggestion ignores the fact that if a

candidate declines to participate in such voluntary programs, he may continue to conceal his actions or intentions with respect to term limits. Or, he may simply mischaracterize his own voting record. Moreover, this suggestion grossly underestimates the obfuscation that occurs when candidates are asked to take a position on term limits. Representatives often voice support for term limits when stumping before the voters even though they obstruct term limits when in Congress. This sleight of hand was best demonstrated when, "[i]n February 1997, representatives obscured their opposition to congressional term limits by voting on several variations of the amendment, allowing them to vote in favor of at least one, secure in the knowledge that none would pass."[7] Voluntary debates and information pamphlets are ineffectual against such deceptive behavior. Ballot labels are therefore necessary to inform voters whether or not their representatives have complied with their instructions. Drawing a line in the sand, in the face of such doublespeak, allows citizens to bring accountability back to public office. The use of ballot labels guarantees that all voters will receive the desired information regarding their representatives and candidates. Because the state will be unable to reach as many voters through other means, such as voter information guides or debates, the ballot label is narrowly drawn to advance the citizens' compelling interests.

---

[7] Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 6 (1999).

IV. MISSOURI'S ARTICLE VIII BALLOT LABEL IS ITSELF CORE POLITICAL SPEECH OF THE PEOPLE, PROTECTED BY THE FIRST AMENDMENT

In the debates of the First Congress regarding the proposal of what would become the Bill of Rights, James Madison considered an explicit "right to instruct" provision to be unnecessary. He recognized that the proposed freedom of speech that would become part of the First Amendment would adequately protect the right of the people to speak collectively in the form of constituent instructions.[8] While it is may seem odd that the body politic can hold First Amendment rights, such a view was consonant with political thought at the time of the founding. "Public liberty was . . . the combining of each man's individual liberty into a collective governmental authority. . . . "[9] Indeed, "public liberty was most fully realized when the people themselves exercised their role in government." *Id.* at 25. Through the use of ballot labels and constituent instructions, the people of Missouri are exercising a public liberty to communicate specific information related to the conduct of public figures. It is core political speech that is, itself, protected by the First Amendment. The labels provide information that the majority of voters wish to receive on a matter of great public concern. As the Court noted in *Buckley*, such information on the attributes of political candidates should be given the broadest protection by the First Amendment.

---

[8] *Id.* at 69, citing 1 *Annals of Cong.* 766 (Joseph Gales ed., 1789).

[9] Gordon S. Wood, *The Creation of the American Republic 1776-1787*, 24 (2d ed. 1998).

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 424 U.S. at 14.

In *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court acknowledged that such speech rights of the majority exist and that when the government speaks for the majority it may regulate the content of its own expression. *Id.* at 833 ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker. . . . "). Moreover, the Court has noted that the First Amendment recognizes "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (*citing Maher v. Roe*, 432 U.S. 464, 475 (1977)). The ballot label is not a direct interference with speech rights, but merely commentary regarding a course of action that the representative or candidate chose not to take. This commentary is speech. Representatives and candidates are still free to speak and vote as they wish, but there is no guarantee they may do so without comment. And this has been so since the First Amendment was ratified. "[T]here is practically universal agreement that a major purpose of th[e] [First] Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates. . . . " *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*citing Mills v. Alabama*, 384 U.S. 214, 218 (1966)). If a candidate objects to Article VIII and to the message conveyed on the ballot labels, the appropriate remedy is found at the ballot box, not the courtroom. The

candidate is free to attempt to persuade the people of Missouri to withdraw their instructions and to rescind Article VIII. "When the government speaks . . . to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S.Ct. 1346 (2000).

The long-standing practice of legislative censure of government officials is a form of collective speech that is, in some ways, analogous to Article VIII. In censuring, the members of the legislature collectively exercise their First Amendment speech rights to comment on the actions of a government official.[10] The condemned conduct of the official may or may not, itself, involve expressive activity. Censure differs from the Article VIII ballot labels in that it is unambiguously critical, rather than merely informative, and it creates a permanent legislative record of the condemnatory message. The U.S. House and the Senate each have passed more than a dozen resolutions criticizing the misconduct of presidents and other high-ranking officials.[11] The most notable instance occurred when the Senate censured President Andrew Jackson for firing his Treasury Secretary for refusing to carry out his instructions to withdraw national bank funds and deposit them in state banks.[12] In addition to resolutions of censure, the

---

[10] Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 377 (1999).

[11] Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 35 (1999).

[12] *Id.* at 35-36.

House and Senate have passed thousands of resolutions expressing opinions on various matters of public concern.[13] Taken together, resolutions of censure and resolutions merely expressing collective opinion represent a long tradition of government speech that is informative, critical, or both.

Respondent cites *Timmons v. Twin Cites Area New Party*, 520 U.S. 351, 363 (1997), for the proposition that "[b]allots serve primarily to elect candidates, not as fora for political expression." Res. Brief on Petition for Writ of Cert. 19. *Timmons*, however, is inapposite because it dealt with candidates wishing to express views on the ballot. Here the state, as opposed to a candidate, is speaking on the ballot. A contrary holding in *Timmons* effectively would have enabled candidates to appropriate state property for their own use. The Court's opinion still left room for the state to speak on its own property. Precisely because the ballot is the state's property, the state must have a substantial amount of control over what is placed on it. Nothing in *Timmons* suggested that the body politic may not use the ballot for political expression. Indeed, it may be inferred from *Timmons* that states retain considerable discretionary control over the content that may be placed on the ballot.

---

[13] *Id.* at 36.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

PATRICK T. O'BRIEN*
BUTLER, GLATER & O'BRIEN
811 S. 13th St.
Lincoln, Nebraska 68508
(402) 475-0881

JOHN M. BOEHM
LEGAL COUNSEL, THE INITIATIVE AND REFERENDUM INSTITUTE
811 S. 13th St.
Lincoln, Nebraska 68508
(402) 475-0881

Counsel of Record

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

No. 99-929

In The

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE, MISSOURI TERM LIMITS ON BEHALF OF PETITIONER, REBECCA McDOWELL COOK AS SECRETARY OF STATE FOR THE STATE OF MISSOURI

STEPHEN J. SAFRANEK
Counsel of Record
Professor of Law
Ave Maria School of Law
3475 Plymouth Road
Ann Arbor, MI 48105-2550
(734) 827-8096

Legal Counsel for Amicus Curiae
Missouri Term Limits

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I. Introduction..... 4

II. Brief History Of The Adoption Of The "Australian Ballot" In The United States..... 5

III. The Ballot Information Provided Under Missouri's Informed Voter Law Is True, And More Accurate Than Other Voting Cues ... 9

IV. States Regularly Provide Voters With Information At The "Climactic Moment Of Choice" .. 13

A. The Seventeenth Amendment To The United States Constitution Provides An Analogy For Missouri's Voter-Approved Informed Voter Law 14

B. "Binding" Instructions To Delegates At A State Constitutional Convention Are Constitutional..... 18

C. States Have The Power To Control The Content Of Their Election Ballots 21

1. Political Party Labels, Emblems, And Other Information..... 24

2. Incumbency Designations..... 26

3. Residency Or Nicknames..... 28

4. Summation..... 28

D. The Ballot Has Been Used To Provide Voters With Information Regarding A Candidate's Position On A Constitutional Amendment..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Celebreeze, 460 U.S. 780 (1983) 13

Anderson v. Martin, 375 U.S. 399 (1964) 1, 14

Bond v. Floyd, 385 U.S. 116 (1966) 29

Buckley v. Valeo, 424 U.S. 1 (1976) (Per Curiam) ..13, 23

Burson v. Freeman, 504 U.S. 191 (1992) 5, 6, 7

Clough v. Guzzi, 416 F.Supp. 1057 (D.Mass. 1976) 14

Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999) 14

Graves v. McElderry, 946 F.Supp. 1569 (W.D.Okla. 1996) 9

Ihlenfeldt v. State Election Bd., 425 F.Supp. 1361 (D.Wis. 1977) 25

In re Opinion of the Justices, 148 So. 107 (Ala. 1933) 19, 21

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 5

Peterson v. Stafford, 490 N.W.2d 418 (Minn. 1992), *cert. denied*, 507 U.S. 1033 (1993) 14, 26, 27

Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) 11, 12

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 3, 4, 10, 11

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

Mich. Const. of 1963, art. VI, §24 26

U.S. Const. art. I, §3, cl. 1 15

U.S. Const. art. I, §4, cl. 1 .....8, 21

U.S. Const. art. V..... 19

U.S. Const. amend. XVII 2, 14, 15, 18

U.S. Const. amend. XVIII 18, 19

U.S. Const. amend. XXI..... 18, 19, 20

Const. of Va., art. II, §3..... 24

STATUTES:

Code of Ala. §17-8-4..... 24

Code of Ala. §17-8-5..... 22

Code of Ala. §17-8-6..... 24

Alaska St. Ann. §15.15.030(4)..... 28

Alaska St. Ann. §15.15.030(5)..... 24

Ariz. Rev. St. Ann. §16-341(D) 25

Ariz. Rev. St. Ann. §16-502(E).....22, 24

Ariz. Rev. St. Ann. §16-703(C) 21

Ariz. Rev. St. Ann. §16-704(A) 21

Ariz. Rev. St. Ann. §16-705(C) 21

TABLE OF AUTHORITIES – Continued

Page

Ark. Code of 1987 Ann. §7-5-208(f)(5) 24

Ark. Code of 1987 Ann. §7-7-305(c)(1)(A) 28

Ark. Code of 1987 Ann. §7-7-305(c)(1)(B) 28

West's Ann. Calif. Code, Elections, §13105(a)(c) ...24, 25

West's Ann. Calif. Code, Elections, §13106 27

West's Ann. Calif. Code, Elections, §13107(a)(1)(2)(3)(4) 28

Colo. Rev. St. Ann. §1-4-601(2) 25

Colo. Rev. St. Ann. §1-5-403(4) 24, 25

Colo. Rev. St. Ann. §1-5-404(1)(a)(b)(c) 22

Conn. General St. Ann. §9-279 24

Del. Code Ann., Title 15, §3302 24

Del. Code Ann., Title 15, §4502(a) 22, 24

Del. Code Ann., Title 15, §5005 24

Del. Code Ann., Title 15, §7706 21

Fla. St. Ann. §101.151(4) 24

Fla. St. Ann. §101.151(5) 22, 24

Fla. St. Ann. §107.04(1) 21

Official Code of Georgia Ann. §21-2-284(c) 26

Official Code of Georgia Ann. §21-2-284.1(a)(b)(3) 26

Official Code of Georgia Ann. §21-2-285(c) ... 22, 24, 26

TABLE OF AUTHORITIES – Continued

Page

Hawaii Rev. St. §11-112(a) 24

Idaho Code Ann. §34-904 24

Idaho Code Ann. §34-906 24

Idaho Code Ann. §34-2205 21

West's Smith-Hurd Ill. Comp St. Ann., Title 10, §5/16-3 24

Burn's Indiana St. Ann. §3-8-6-5 .....24, 25

Burn's Indiana St. Ann. §3-8-7-11 .....24, 25

Burn's Indiana St. Ann. §3-10-5-7 21

Burn's Indiana St. Ann. §3-10-5-9 21

Burn's Indiana St. Ann. §3-11-2-5 .....24, 25

Burn's Indiana St. Ann. §3-11-2-6(a)(b)(c) 23

Burn's Indiana St. Ann. §3-11-2-9 25

Iowa Code Ann. §49.31(1) 24

Kansas St. Ann. §25-613 24

Ky. Rev. St. Ann. §118.325(2)(4) 24, 25

La. St. Ann. §18:551(D) 24

Maine Rev. St. Ann., Title 21-A, §602(2)(A)(B) 24

Maryland Code of 1957, art. 33, §9-210(g) 24

Maryland Code of 1957, art. 33, §9-210(j)(2)(i)(ii) 23

Mass. Gen. Laws Ann., ch. 53, §34 .....26, 28

Mass. Gen. Laws Ann., ch. 54, §41 .....26, 28

Mich. Comp. Laws Ann. §168.696(1) 24

TABLE OF AUTHORITIES – Continued

Page

Minn. St. Ann. §204B.07(1)(c) 25
Minn. St. Ann. §204B.36(2) 24, 25
Minn. St. Ann. §204B.36(5) 26
West's Ann. Miss. Code, §23-15-359(2) 24
Vernon's Ann. Missouri St. §115.237(2) 24
Mont. Code Ann. §13-10-203 24
Mont. Code Ann. §13-10-209(1)(a) 24
Mont. Code Ann. §13-10-303 24
Mont. Code Ann. §13-26-103 21
Nevada Rev. St. Ann. §293.267(3)(a) 24
N.H. Rev. St. Ann. §656:5(II) 23, 24
N.H. Rev. St. Ann. §656:9 24
N.H. Rev. St. Ann. §656:11 25
N.J. St. Ann. §19:13-4 24
N.J. St. Ann. §19:23-17 25
N.J. St. Ann. §40:45-10 25
N.M. St. §1-7-6 ..... 24, 25
McKinney's Consolidated Laws of N.Y. §2-124 25
McKinney's Consolidated Laws of N.Y. §6-120 25
McKinney's Consolidated Laws of N.Y. §6-146(1) 25
McKinney's Consolidated Laws of N.Y. §7-104(4)(a) 24, 25
McKinney's Consolidated Laws of N.Y. §7-104(5) 25

TABLE OF AUTHORITIES – Continued

Page

McKinney's Consolidated Laws of N.Y. §7-106 ..... 24, 25
Gen. St. of N.C. §163-140 24
N.D. Century Code Ann. §16.1-06-05(3) 24
Baldwin's Ohio Rev. Code Ann. §3523.04 21
Baldwin's Ohio Rev. Code Ann. §3505.03(B) 24
Okla. St. Ann. §6-106 ..... 23, 24, 25
Ore. Rev. St. §254.135(4)(a) 24
Ore. Rev. St. §254.135(4)(c) 27
Purdon's Penn. St. Ann., Title 25, §2963(b) 24
Gen. Laws of R.I. Ann. §17-15-8 24
Gen. Laws of R.I. Ann. §17-19-9.1 ..... 23, 24, 26
S.D. Codified Laws §2-15-4 21
S.D. Codified Laws §12-16-2 24
Tenn. Code Ann. §2-5-206 23
Tenn. Code Ann. §2-5-206(b) 24
Tenn. Code Ann. §2-5-207(d)(1) 24
Vernon's Texas St. and Codes Ann., 5 §52.065(d) 23, 24
Vernon's Texas St. and Codes Ann. §52.067 24
Utah Code Ann. §20A-15-103 21
Utah Code Ann. §20A-6-301 ..... 24, 25
Vt. St. Ann., Title 17, §1814 21
Vt. St. Ann., Title 17, §2472(b) 24

TABLE OF AUTHORITIES – Continued

Page

Rev. Code of Wash. Ann. §29.30.020 24

Rev. Code of Wash. Ann. §29.74.060 21

W.Va. Code of 1966, §3-6-2 24

W.Va. Code of 1966, §3-6-2(c)(3) 23

Wis. St. Ann. §5.64(1)(b) 23, 24

Wyo. St. Ann. §22-6-120(a)(vii) 24

OTHER AUTHORITIES:

26 AM. JUR. 2D *Elections* §299 (1996) 8

Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State*, 145 U. PA. L. REV. 353 (1996) 8, 9

Donald E. Daybell, Note, *Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections*, 80 B. U. L. REV. 289 (2000) 10

L.E. FREDMAN, THE AUSTRALIAN BALLOT (1968) ... 5, 6, 7, 8

Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533 (1999) 3, 10, 11, 12

Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 10

GEORGE H. HAYNES, 1 THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE (Houghton, Mifflin Co. 1938) (reissued Russell and Russell 1960) 16

TABLE OF AUTHORITIES – Continued

Page

Idaho Session Law, House Bill No. 16, §41 (1909) 16

P.K. Jameson and Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417 (1995) 4

DAVID B. MAGLEBY, DIRECT LEGISLATION VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984) 5

NATIONAL PARTY PLATFORMS, 1840-1972 (Univ. of Ill. Press, 5th ed. 1973) 29

1909 Laws of Nebraska, ch. 51, §2 17

Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991) 6, 8

Washington Session Laws, 1907, ch. 209, §37 17

BRIEF OF MISSOURI TERM LIMITS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

Missouri Term Limits is the local grassroots organization that drafted, sponsored and successfully qualified the initiative (the "informed voter law") that was enacted by the voters of Missouri, is now part of the Missouri Constitution, and is being challenged before this Honorable Court.[1] This case involves the right of the people of Missouri to instruct their elected officials and inform themselves as voters. No more precious right exists in the United States.

Like other state-sponsored voting cues – political party designations, party emblems, residency, and incumbency designations – the informed voter law assists voters in the voting booth. And, like other information, the informed voter law will influence some voters. This Honorable Court has only once struck down information that was provided on a state's election ballots. *See Anderson v. Martin*, 375 U.S. 399 (1964) (striking down on equal protection grounds a Louisiana statute requiring ballots to designate the "race" of the candidates).

The informed voter law fosters a "legitimate governmental interest in informing the electorate as to candidates." *Anderson v. Martin*, 375 U.S. at 403. The informed voter law instructs candidates and informs the citizenry regarding a candidate's voting intentions or record thereby allowing voters to assess that candidate's qualifications. Missouri Term Limits modeled the informed

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this Amicus Curiae Brief. Furthermore, no other entity or person, aside from Amicus Curiae, made any monetary contribution for the preparation or submission of this brief to this Honorable Court.

voter law after the ballot language used by states to adopt the Seventeenth Amendment.

An intense political debate surrounded the adoption of the informed voter law. That debate led the citizenry of Missouri to include the informed voter law in their Constitution.

The power of the people to regulate the content of their election ballots through the initiative should certainly not be more circumscribed than the legislature's power to control the contents of and access to the ballot. Missouri Term Limits seeks to protect its interests and the interests of the millions of Missouri voters that are at stake in this case.

SUMMARY OF ARGUMENT

The citizenry has a right to instruct candidates and to provide themselves with truthful ballot information about candidates. Since the creation of the modern ballot, states, essentially the two major parties, have regulated candidates' ability to access the election ballot and the contents of such ballots by a multitude of multi-faceted statutes. State election codes are extensive. In this case, the citizens, not the legislators have regulated the election ballot.

Missouri Term Limits, as Amicus Curiae in support of the Petitioner, will show how the informed voter law is consistent with our country's history of ballot instruction and information. It will do so in three ways. First, Amicus Curiae will provide this Honorable Court with an historical perspective on the adoption of the "Australian ballot" as part of electoral reforms during the Nineteenth Century. Second, Amicus Curiae will demonstrate that the information under consideration in this case is accurate and true, and therefore more important than the information used by the two major parties to electioneer on the ballot. Finally, Amicus Curiae will show this Honorable Court how states have traditionally used the ballot to "instruct" and inform. Amicus Curiae will show how

Missouri Term Limits modeled the informed voter law after other ballot information, specifically the ballot instructions used to promote the adoption of the Seventeenth Amendment. In addition, Amicus Curiae will show that the vast array of state ballot information constitutes "issue discrimination" that is constitutional.

The informed voter law, Article VIII, §§15-22 of Missouri's Constitution, is constitutional. It is more informative and less discriminatory than virtually any other information that appears on ballot. The informed voter law provides information that is informative and truthful. It is far more useful for the citizenry than party labels. Indeed, given the huge differences among members of the same political party, and given the fact that candidates often explicitly reject issues in party platforms, the informative value of party labels is questionable.[2] Party affiliations traditionally represented specific political beliefs and provided the voters with a "shortcut" "that economize[d] on information about issues."[3] However, due in part to the two-party political system together with single-member electoral districts, there has been a "convergence of the parties with respect to their positions on issues . . . Because political parties seek to gain widespread support, they phrase their political commitments in general terms so they can attract candidates and voters of diverse ideologies."[4]

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), this Honorable Court stated,

> To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters

---

[2] Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1548-50 (1999).

[3] *Id.* at 1548.

[4] *Id.* at 1548-49.

> inform themselves for the exercise of the franchise.

Id. at 220. More importantly, as one commentator has explained,

> Information provided by informed voter ballot notations, assuming that the information is accurate, could allow the electorate to take advantage of a shortcut to candidates' ideologies, which in turn would help voters predict the behavior of candidates once they are elected. By allowing both incumbents and challengers a credible precommitment opportunity and preventing candidates from taking different positions for different audiences, ballot notations could provide voters with a more accurate signal of ideology than current campaign tactics. Moreover, the information is more likely to reveal ideology in a more precise way than cues on which voters now rely, such as party affiliation.[5]

ARGUMENT

I. INTRODUCTION

Over twenty states provide citizens with some form of statewide direct democracy.[6] "Initiatives generally allow the public to bypass the legislature and reserve direct lawmaking power in the voters of the state."[7] They

---

[5] *Id.* at 1550.

[6] States that currently have some form of statewide direct democracy are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming, and the District of Columbia.

[7] P.K. Jameson and Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 418 (1995).

are "the means by which voters can correct legislative sins of omission and the popular referendum [is] the means of correcting legislative sins of commission."[8]

Initiative and referendum laws were passed on a theory of trusting the individual and distrusting politicians and political parties, as well as legislatures.[9] These laws emphasize that it is the people who govern in the United States.[10] In this case, the citizens of Missouri approved a ballot initiative that instructs legislators regarding the citizens' desire for term limits, and informs voters how legislative candidates intend to act or have acted on a specific term limits amendment. The ballot language challenged in this case is the citizens' insurance policy for keeping federal and state legislative candidates honest in their electioneering practices before the people.

II. BRIEF HISTORY OF THE ADOPTION OF THE "AUSTRALIAN BALLOT" IN THE UNITED STATES

Prior to the use of the paper ballot in the electoral process, public officials were elected by viva voce or by a show of hands. This precluded secrecy and provided the proper atmosphere for bribing and intimidating voters.[11] By the Revolutionary period, however, most of the states' constitutions required paper ballots.[12] Voters themselves wrote their own ballots, filled them out at home, and took

---

[8] DAVID B. MAGLEBY, DIRECT LEGISLATION VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 35 (1984).

[9] *Id.* at 20.

[10] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819) (Marshall, C.J.) ("The government of the Union . . . is emphatically and truly, a government of the people.").

[11] *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

[12] *Id.* at 200; L.E. FREDMAN, THE AUSTRALIAN BALLOT 20 (1968).

them to the polling places.[13] Beginning in the 1820's, several court decisions affirmed the use of printed paper ballots, and Maine became the first state, in 1831, to enact legislation governing the paper and ink to be used for ballots.[14]

By the mid-Nineteenth Century, many people viewed the voting process in the United States as meaningless because political parties pre-printed their own ballots that were given to the voters at the polls.[15] The parties' ballots were typically printed with bright colors, and unique designs and emblems so that the ballot could be identified by the parties from a distance.[16] This contributed to the problem of voters being bribed and intimidated by party machines.[17]

Distinctly colored paper ballots allowed "ballot peddlers" to determine that voters used the ballot by following voters to the ballot box. Peddlers would wait outside of the polling place for voters to come out at which time voters would be paid for using the ballot.[18] This situation lead to "scuffling and intimidation." Oftentimes the scuffling and intimidation were artificially created by the parties in order to scare away "decent people and magnify the coerced vote."[19]

---

[13] *Burson v. Freeman*, 504 U.S. at 200.

[14] FREDMAN, *supra* note 12, at 21-22.

[15] *Id.* at ix.

[16] *Burson v. Freeman*, 504 U.S. at 200.

[17] FREDMAN, *supra* note 12, at ix; and Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need not Apply*, 28 HARV. J. ON LEGIS. 167, 172 (1991) ("[E]ach party typically printed ballots in the color of its choice, which made secret balloting all but impossible and allowed for regular episodes of bribery, coercion, and intimidation.").

[18] FREDMAN, *supra* note 12, at 22.

[19] *Id.* at 24.

Other countries experienced similar problems with their electoral systems. To address these problems, Britain, in 1872, replaced its system of oral voting with the "Australian ballot" so named for the system that had been first created in Australia in the 1850's. Under this system, the government determined what constituted "nomination", what was printed on ballots, and distributed ballots to the voters. In addition, the government ballot included all of the candidates' names, political advertising in the forms of legends or symbols and provided for polling booths in which only election officials, "scrutinees" for the candidates, and voters could enter. These measures were designed to improve the secrecy of the voting process.[20] Belgium was the next to follow in adopting the "Australian ballot" system in 1877.[21]

By 1882, the Philadelphia Civil Service Reform Association advocated the adoption of the "Australian ballot" in the United States.[22] The first Australian ballot law passed in the United States in 1888 when Louisville, Kentucky incorporated the "Australian ballot."[23] Louisville provided voters an official blanket ballot at the city's expense. Candidates were nominated by petition and were required to pay a twenty-dollar filing fee. Candidates' names were arranged alphabetically under the office for which they were running, and a "write-in" vote was provided.[24]

Massachusetts was the first state to adopt the "Australian ballot" system in 1888 followed by New York.[25] By the end of 1889, ten states had adopted the "Australian

---

[20] *Id.* at ix; and *Burson v. Freeman*, 504 U.S. at 202.

[21] *Burson v. Freeman*, 504 U.S. at 202.

[22] *Burson v. Freeman*, 504 U.S. at 203.

[23] FREDMAN, *supra* note 12, at 31.

[24] *Id.* at 31, 46, 47.

[25] *Burson v. Freeman*, 504 U.S. at 203; Smith, *supra* note 17, at 172.

ballot" system,[26] and by 1900, that number had increased to thirty-nine.[27] Under Article I, §4, the States exercised their plenary power to determine the "manner" of elections subject to alteration by the federal legislature. Indeed, today, the states have a variety of ballot types. Although the States have adopted dissimilar "Australian ballot" systems, two major aspects of the system have remained: the maintenance of secrecy while voting and an official ballot that included all of the candidates' names printed and distributed at the states' expense.[28]

The introduction of the "Australian ballot" system throughout the United States minimized the threat of visible fraud and bribery during the electoral process.[29] However, a consequence of the "Australian ballot" system was that the government, specifically state government, heavily regulated the electoral processes, including which candidates, parties and political symbols and legends would have access to the ballot.[30] This marked the beginning of the two major parties' dominance over the States' electoral processes.[31] The parties regulate the electoral process to exclude any threat to them by third-party and independent candidates. In addition, in some instances, the majority party in the state legislature would use the legal system to create obstacles in the

---

[26] FREDMAN, *supra* note 12, at 46.

[27] *Smith, supra* note 17, at 172.

[28] 26 AM. JUR. 2D *Elections* §299 (1996).

[29] *Burson v. Freeman*, 504 U.S. at 206.

[30] Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State*, 145 U. PA. L. REV. 353, 359 (1996); Smith, *supra* note 22, at 173.

[31] Cofsky, *supra* note 30, at 360; Smith, *supra* note 12, at 173-74 ("By the mid-1920's, state laws governing access to the general election ballot were heavily weighted in favor of the existing major parties.").

electoral process for the other major party in order to secure its own dominance.[32]

The case before this Court poses a challenge to the major parties' control over states' electoral process because it is the citizens, not the legislators, who want to provide ballot information. The citizens of Missouri want to provide voters with truthful information regarding candidates running for federal and state office. Citizens want to hold the candidates who are seeking their votes accountable for their promises and actions.

III. THE BALLOT INFORMATION PROVIDED UNDER MISSOURI'S INFORMED-VOTER LAW IS TRUE, AND MORE ACCURATE THAN OTHER VOTING CUES

The major political parties, acting through state legislatures, have determined state electoral regulations; i.e., ballot access restrictions, as well as ballot content. In this case, however, the citizens have exercised legislative power via the initiative to control, in part, what information is provided on the ballot to help them make an informed choice. The two major parties' control over the voting process is jeopardized by the citizens' desire to

---

[32] Cofsky, *supra* note 20, at 355, 360; Smith, *supra* note 12, at 173 ("However, 'within' a very few years these laws underwent a number of changes that are difficult to justify as furthering the government's mandate to conduct efficient and honest elections.' The partisan political interests of legislators writing the ballot-access laws seem likely to have been the reason behind these changes."). *See also Graves v. McElderry*, 946 F.Supp. 1569 (W.D.Okla. 1996) (striking down on equal protection grounds an Oklahoma statute that always printed, in partisan elections, the Democratic Party candidates' names in the top position on the ballots). This Oklahoma statute was enacted by a Democratically-controlled state legislature and signed into law by Oklahoma's then elected Governor, David Walters, who was also a Democrat. *Graves v. McElderry*, 946 F.Supp. at 1573.

make an informed decision through the use of a voting cue chosen by voters that gives them accurate information about the candidates. This information supplements traditional voting cues such as political party labels.

Although some states provide voters with a candidate's political party affiliation as a voting cue on the ballot and this Court recognized the role that party labels play in the role by which voters inform themselves,[33] such information has lost its informative value for the voters. Candidates' "voiced positions" on a particular issue are often as numerous as the groups of voters the candidates face.[34] Also, political campaigns have become "candidate-based" so that political party cues have become less relevant.[35] One author explained that fewer voters " 'have such affiliation and fewer of those with affiliation follow it. The individual voter evaluates candidates on the basis of information and impressions conveyed by the mass media, and then votes on that basis.' "[36]

---

[33] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986).

[34] Garrett, *supra* note 2, at 1547 ("Public pledges revealed through ballot notations make the politician's stance visible to all voters, removing the politically attractive option of making clear and inconsistent statements to private groups and providing the public with ambiguous platitudes."). *See also* Donald E. Daybell, Note, *Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections*, 80 B. U. L. Rev. 289 n.1. A Massachusetts independent voter explained that she could not tell the major parties apart. A "Letter to the Editor" was entitled, "Those Wavering Party Lines; Democrats and GOP Would Rather Stand for Nothing than Risk Votes."

[35] Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331, 360.

[36] *Id.* (quoting Norman H. Nie, et al., The Changing American Voter 346 (1979)).

Nevertheless, as this Court pointed out in its opinion in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986), party labels provide voters with a "shorthand designation of the views of party candidates on matters of public concern," and they play a role in how voters educate themselves before voting.[37] Party labels are undoubtedly a form of political advertising. Lower courts have recognized the value of party labels. See *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) (court struck down an Ohio statute that provided partisan candidates with labels but not petition process candidates). In fact, in striking down the provision in *Rosen* the Sixth Circuit relied on expert witness testimony presented by the plaintiffs. In affidavits, two of plaintiffs' experts explained that party labels were the single most influential factor on political opinions and voting. One affidavit explained that

> Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinion and voting. Almost two-thirds of the electorate has some form of party loyalty, and the tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level. Without a designation next to an Independent's name on the ballot, the voter has no clue as to what the candidate stands for. Thus, the state affords a crucial advantage to party candidates by allowing them

---

[37] *See also id.* at 363 ("A party label provides a shorthand way for voters, who have little incentive to invest time into learning about the positions of candidates, to identify at least some of the candidate's beliefs. It provides the candidate with a 'brand' name."); and Garrett, *supra* note 2, at 1534 (name and party affiliation provide voters with the strongest cues).

> to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy.[38]

If parties are allowed to influence voters with the most influential information, the citizens should be allowed to include what they consider the most important information regarding candidates. The informed voter law provides true information and information that the people think is more important than party labels.

Certainly, printing the informed voter law's ballot information next to some candidates' names will have some influence on some voters. However, party labels, symbols of elephants or donkeys, profiles of presidents and other information printed next to or with a candidate's name or in a column under which a candidate's name appears also influence voters, almost exclusively to the advantage of the two major parties. Yet, neither this Court, nor any court, has ever considered party labels unconstitutional.

The major parties have controlled who obtains access to the ballot and how and what information is printed there. Indeed, as some writers have explained, parties recognized the significance of the ballot as a means for speaking to the voters. They were able to get states to adopt the party-column ballot format; a format that fosters straight-ticket voting.[39] Party-columns hardly were designed to foster informed and thoughtful voting. Instead, they are meant to foster straight ticket voting, an advantage to the two major political parties.

---

[38] *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992). "According to DeSario, Independent candidates are handicapped by their inability to communicate a political designation on the ballot. However, party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior." *Id.*

[39] *See* Garrett, *supra* note 2, at 1535-36.

By enacting the informed voter law, Missouri citizens provided themselves with specific, accurate, and truthful information on the ballot. It is a laudable attempt by the citizens of Missouri to require accountability from candidates.

IV. STATES REGULARLY PROVIDE VOTERS WITH INFORMATION AT THE "CLIMACTIC MOMENT OF CHOICE"

Nearly all of the states provide voters with information on the ballot including party labels, residence, office sought, incumbency, and/or nicknames to be used with a candidate's name on the ballot. Missouri's informed voter law is the most important of the multitude of regulations governing the content of election ballots.

This Honorable Court recognized that states have an interest in an informed and educated electorate. *Anderson v. Celebreeze*, 460 U.S. 780, 796 (1983). Indeed, this Court explained that, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The informed voter law is being attacked so vigorously by politicians precisely because of its power to "inevitably shape the course that we follow as a nation." *Id.*

Opponents contend that the informed voter law allows states to isolate an issue for public debate and then single out certain candidates who do not take particular actions on that issue. The Eighth Circuit Court of Appeals explained that

> The only 'information' the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires. Furthermore, the labels are particularly harmful because they appear on the ballot, an official document produced by the state. Thus, the

> labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that §17 requires.

Gralike v. Cook, 191 F.3d 911, 918-19 (8th Cir. 1999).

Yet, states regularly single out candidates on their election ballots by printing party labels, residency, nickname, incumbency designations, and other "information" with candidates' names. Each of these regulations determine that some issue is the most important one, and are meant to harm or help a candidate.

Indeed, some labels, such as party affiliation, are "outcome determinative" in many electoral districts. It is the party label, not the candidates' particular character or positions, that determines scores of elections. Likewise, candidates may lose votes because of ballot information that is not printed by their names.[40] Yet, this Court has only once struck down ballot information.[41] This Honorable Court and lower courts have consistently recognized the historical richness of our ballot laws and the amplitude of information that states may give to or withhold from candidates. The informed voter law has a direct analogue – the ballot language used to foster support for the Seventeenth Amendment – where such amplitude was exercised.

A. The Seventeenth Amendment To The United States Constitution Provides An Analogy For Missouri's Voter-Approved Informed Voter Law.

Missouri's informed voter law may appear unusual. However, passage of the Seventeenth Amendment to the United States Constitution was dependent upon a process

---

[40] *See Clough v. Guzzi*, 416 F.Supp. 1057, 1068 (D.Mass. 1976); *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1993), *cert. denied*, 507 U.S. 1033 (1993).

[41] *Anderson v. Martin*, 375 U.S. 399 (1964).

of providing ballot information indistinguishable from that being used in the informed voter law. The Seventeenth Amendment precedent was relied upon by the drafters of the informed voter law because that amendment, like term limits, posed a direct conflict between the interests of the citizens and the interests of elected officials.

Article I, §3 of the United States Constitution provides that United States Senate is to be composed of two Senators from each State "chosen by the Legislature thereof".[42] Because of the role that Senators play in proposing amendments to the Constitution, a law allowing the election of Senators by the people seemed incapable of passage – Senators faced a conflict of interest because they were elected by legislatures. This direct conflict is also present in the case of term limits.

Despite the direction of Article I of the Constitution, Oregon, in 1904, through the initiative process, passed a primary election law that allowed one of two statements to be printed with a state legislative candidate's nominating petitions. The statements informed the voters whether the candidate promised to vote for the people's choice for United States Senator. Statement Number 1 read:

> I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office, I shall always vote for that candidate for United States Senator in Congress who has received the highest number of the people's vote for that position at the general election next preceding the election of a Senator in Congress without regard to my individual preferences.

---

[42] U.S. Const. art. I, §3, cl. 1, states, "The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,]." (The words in brackets were changed by the adoption of the Seventeenth Amendment which was ratified by the States on April 8, 1913).

Statement Number 2 read:

> During my term of office I shall consider the vote of the people for United States Senator in Congress as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so seems to be to be sufficient.[43]

To make the people's choice for Senator more secure, the voters of Oregon circulated pledges among themselves. The voters pledged not to sign any nominating petition or vote for the nomination of any candidate who did not sign Statement Number 1.[44] Finally, the "candidates" for United State Senate were allowed to include on their petitions a statement not to exceed one hundred words, and on the ballot after the candidates' name, a statement not to exceed twelve words which would convey to the voters the candidates' "measures or principles he especially advocates."

– Besides Oregon, other states enacted primary election laws allowing for information to be printed on the election ballots with the candidates' names. For example, Idaho enacted a primary law in 1909 that allowed candidates for state legislative office to sign a "declaration" with their nomination papers which stated, in part, that if elected to the state legislature, the candidate would "always vote for the candidate for the United States Senator who has received a majority for the first choice votes upon my party ticket . . . "[45] If the candidate made such a declaration on the nomination papers, on the official primary ballot near the candidate's name would

---

[43] GEORGE H. HAYNES, 1 THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 101-103 (Houghton, Mifflin Co. 1938) (reissued Russell & Russell 1960).

[44] *Id.* at 101-102.

[45] Idaho Session Law, House Bill No. 16, §41 (1909).

appear, "Pledged to vote for party choice for U.S. Senator."[46] *See* Appendix at 1a.

Similarly, Nebraska's primary election law allowed candidates for the state legislature to submit with their nomination application a Statement Number 1 or a Statement Number 2 that was practically identical to Oregon's primary election law. On that part of the official primary election ballot that contained the names of the candidates for legislative nomination would be printed immediately following their names "Promises to vote for people's choice for United States Senator" or "Will not promise to vote for people's choice for United States Senator" depending on which statement the candidate submitted with their nomination application.[47] *See* Appendix at 2a-3a.

The State of Washington also provided a statute governing the nomination of candidates for public office that any candidate running for state senator or for the state house could, if they wanted to, sign and file with their declaration of candidacy or nomination papers a declaration stating,

> I hereby declare to the people of the State of Washington, and particularly of my legislative district, that during my term of office I will always vote for the candidate for United States Senator who has received the highest number of votes upon my party ticket for the position at the primary election next preceding the election of United States Senator; and in such case there shall be printed on the official primary ballot, opposite or just below said candidate's name the following: Pledged to vote for party choice for United States Senator.[48]

See Appendix at 4a.

---

[46] *Id.*

[47] 1909 Laws of Nebraska, ch. 51, §2 at 253 (emphasis added).

[48] Washington Session Laws, 1907, ch. 209, §37, at 475-76.

As the above examples demonstrate, even though the United States Constitution invested state legislatures with the power to select Senators, citizens were able to convey to their state legislators their choice for Senator in two ways. First, they were allowed to vote for "candidates" for the United States Senate. In addition, they placed language on the ballot regarding what action a legislator intended to take on the citizens' non-binding vote. Likewise, the informed voter law permits the citizens of Missouri to have readily available while voting information regarding what action their state and federal legislative candidates intend to take or took with respect to a specific amendment.

The Seventeenth Amendment was promoted in a virtually identical manner as the informed voter law. The statutory provisions mentioned above ultimately led to the proposal and ratification of the Seventeenth Amendment. The fact that the ballot information provided in Missouri's law may be rare is not an argument for unconstitutionality. The Seventeenth Amendment provides this Honorable Court with direct historical precedent for upholding the validity of the informed voter law.

B. "Binding" Instructions To Delegates At A State Constitutional Convention Are Constitutional.

States have also used the ballot to instruct delegates to state ratifying conventions. The Alabama Supreme Court has ruled that even "binding" instructions to the delegates to a state convention called to consider the ratification or rejection of the Twenty-first Amendment to the United States Constitution[49] did not violate Article V

---

[49] The Twenty-first Amendment to the United States Constitution was ratified by state conventions on December 5, 1933. It repealed the Eighteenth Amendment which prohibited the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes . . . " *See* U.S. Const. amend. XVIII.

of the United States Constitution.[50] In *In re Opinion of the Justices,* 148 So. 107 (Ala. 1933), the Alabama Supreme Court advised the Governor that a ballot providing for the election of delegates to a state convention called to consider the adoption of the Twenty-first Amendment would not violate Article V of the United States Constitution.

On these ballots, voters indicated whether they were "for" or "against" repeal of the Eighteenth Amendment and ratification of the Twenty-first Amendment. *In re Opinion of the Justices,* 148 So. at 109. The candidates for delegates to this convention were then required to subscribe to an oath[51] that if elected as a delegate to the

---

[50] U.S. Const. art. V provides, in part, that

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . .

[51] The oath that convention delegates were required to subscribe to stated, in relevant part,

> I,___, do solemnly pledge myself, in the event of my election to a convention to be held in Montgomery for the purpose of considering the ratification or rejection of the proposed 21st amendment to the Constitution of the United States, to abide by the result of the referendum in the State on the question of the ratification or rejection of the proposed 21st Amendment to the Constitution of the United States;

ratifying convention, they would abide by the result of the referendum vote taken of the people regarding the ratification or rejection of the Twenty-first Amendment. *Id.* at 108. The issue for the court to consider was "D[id] the Constitution forbid a state law providing for an instructed delegation to such convention, a delegation pledged to voice the consent of the governed, ascertained by the method recognized throughout our system, namely, the ballot?" *Id.* at 110.

Conceding that "conventions" were representative bodies, the Alabama Supreme Court explained,

> [I]t is more truly representative when expressing the known will of the people. Keeping in view the fundamental doctrine of a government of the people, by the people, and for the people, we are unable to see in the Federal Constitution any purpose to prohibit a direct and binding instruction to the members of the convention voicing the consent of the governed . . . The direct pledge given to abide instructions can scarcely be more sacred than the solemnly implied pledge of electors to voice the choice of the people of their respective states for President and Vice President . . . The prescribed contents of the ballot merely inform the voter more fully as to the meaning and effect of his vote.

---

and should a majority of votes cast in said election be for ratification, then I pledge myself to vote for the ratification of the proposed 21st amendment in the convention, but should a majority of the votes cast in said election be for rejection of the proposed 21st amendment, then I pledge myself to vote for the rejection of the proposed 21st amendment to the United States Constitution . . .

In re Opinion of the Justices, 148 So. at 111. Alabama's position is consistent with that of at least eleven states.[52]

The Alabama experience and numerous state laws are further evidence of citizens' right to inform and instruct. In our deliberative democracy, elected officials ultimately may act as they deem best. However, the citizenry have the right to hold them accountable for their actions.

C. States Have The Power To Control The Content Of Their Election Ballots.

Article I, §4 of the Constitution invests states with the power to regulate the "manner" of elections. States have exercised that power by enacting a multitude of regulations that frequently identify criteria or standards for choosing between candidates.

The states' power to control the content of their election ballots is often exercised in favor of the two major political parties. Nearly all of the states provide for

---

[52] Eleven states' nomination petitions for delegates to ratifying conventions for constitutional amendments to the Federal Constitution require candidates to include a statement in their petition regarding whether they oppose or favor ratification of the proposed amendment. In Arizona, nomination petitions for delegates to such conventions must have a statement regarding whether the candidate favors or opposes ratification of the amendment. A delegate who is elected based on a platform or nomination of petition statement favoring or opposing ratification must vote in accordance with that platform or statement at the convention; otherwise, the delegate is guilty of a misdemeanor, and the delegate's vote will not be considered. *See* AZ. Rev. St. Ann. §§16-703(C); 16-704(A); and 16-705(C). For states with similar provisions , see Del. Code Ann., Title 15, §7706; Fla. St. Ann. §107.04(1); Idaho Code Ann. §34-2205; Ind. Code §3-10-5-7 and §3-10-5-9; Mont. Code Ann. §13-26-103; Ohio Rev. Code Ann. §3523.04; S.D. Codified Laws §2-15-4; Utah Code Ann. §20A-15-103; Vt. St. Ann., Title 17, §1814; and Rev. Code Wash. Ann. §29.74.060.

party labels and some states actually provide preferences for the major party candidates. For example, states give the major party candidates preferential ballot position by printing the names of their candidates in the first two columns of the ballot followed by the names of independent or third-party candidates.[53]

---

[53] *See, e.g.*, ALA. St. §17-8-5 ("In the case of nomination by independent bodies, the ballot shall be so arranged that at the right of the last column for party nomination the several tickets of the names of the independent candidates shall be printed in one or more columns according to the space required, . . . "); AZ. Rev. St. Ann. §16-502(E) ("The lists of the candidates of the several parties shall be arranged with the names of the parties in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor, . . . In the case of political parties which did not have candidates on the ballot in the last general election, such parties shall be listed in alphabetical order to the right of the parties which did have candidates on the ballot in the last general election . . . "); COLO. Rev. St. Ann. §1-5-404(1)(a)(b)(c) ("The names of the candidates of the two major political parties shall be placed on the general election ballot in an order established by lot and shall comprise the first group; . . . "); DEL. Code Ann. Rev. §4502(a) ("The device named and chosen and the lists of candidates of the Democratic Party shall be placed in the first column on the left-hand side of the ballot, of the Republican Party in the second column, and of any other party, and the space for the voter to write in the name of any candidate of his or her choice for any office, in such order as the department of elections shall decide. The names of unaffiliated candidates shall appear in alphabetical order, under the heading 'Unaffiliated Candidates,' after the listing of the various political parties."); FLA. St. Ann. §101.151(5) ("Minor political party candidates and candidates with no party affiliation shall have their names appear on the general election ballot following the names of recognized political parties, . . . "); Code of GA. Ann. §21-2-285(c) ("In a general election, the names of candidates who are nominees of a political party shall be placed under the name of their party. The columns of political parties shall be printed on the ballot, beginning on the left side thereof,

All candidates who are members of one of the major political parties are listed with that party label. Yet, this Honorable Court has recognized that the labels "Democrat" or "Republican" often tell voters little. *See Buckley v. Valeo,* 424 U.S. 1, 70 (1976) (per curiam). By printing certain information on the ballot, states tell voters that such information is more important than other possible information. A variety and breadth of such information is provided throughout the fifty states.

---

and shall be arranged from left to right in the descending order of the totals of votes cast for candidates of the political parties for Governor at the last gubernatorial election. The columns of parties having no candidate for Governor on the ballot at the last gubernatorial election shall be arranged alphabetically according to the party name to the right of the columns of the parties so represented. The columns of political bodies shall be arranged alphabetically according to the body name to the right of the party columns. The names of all independent candidates shall be printed on the ballot in a column or columns under the heading 'Independent,' which shall be placed to the right of the political body columns."); IND. St. Ann. §3-11-2-6(a)(b)(c); MD. Code of 1957, Art. 33, §9-210(j)(2)(i)(ii); N.H. Rev. St. Ann. §656:5(II)(. . . , the names of the candidates of the party which received the largest number of votes at the last preceding state general election shall be listed first."); OKLA. St. Ann. §6-106 ("For each ballot for which there are partisan candidates, the candidates of the recognized parties shall be printed in the first position in lot order followed by candidates of unrecognized parties in lot order followed by independent candidates in lot order."); General Laws of R.I. Ann. §17-19-9.1; TENN. Code Ann. §2-5-206 (independent candidates' names are listed immediately after the names of the candidates of the political parties); Tex. St. and Codes Ann. §52.065(d) (independent candidates are listed in a column following the political party columns); W.VA. Code of 1966 §3-6-2(c)(3); WIS. St. Ann. §5.64(1)(b).

1. Political Party Label, Emblems And Other Information.

Most States have enacted regulations that allow party affiliation or lack thereof to be printed either with the candidates' names or the candidates' names are listed under the appropriate party label column on the ballot.[54] In some states the parties are also permitted to print a party emblem as an additional means of associating the party with its candidates.[55] Furthermore, some states

---

[54] *See* Code of ALA., §§17-8-4, 17-8-5; Alaska St. Ann. §15.15.030(5); AZ. Rev. St. Ann. §16.502(E); Ark. Code of 1987 Ann. §7-5-208(f)(5); West's Ann. Calif. Code, Elections, §13105(a)(c); Colo. Rev. St. Ann. 1-5-403(4); Conn. General St. Ann. §9-279; Del. Code Ann. Rev. 1974, Title 15, §§4502(a) and 5005; Fla. St. Ann. §101.151(4)(5); Official Code of Ga. Ann. §21-2-285(c); Hawaii Rev. St. §11-112(a); Idaho Code Ann. §§34-904 and 34-906; West's Smith-Hurd Ill. Comp. St. Ann. Title 10, §5/16-3; Burn's Indiana St. Ann. §§3-8-6-5; 3-11-2-5; Iowa Code Ann. §49.31(1); Kansas St. Ann. §25-613; Ky. Rev. St. Ann. §118.325(2)(4); La. St. Ann. §18:551(D); Maine Rev. St. Ann., Title 21-A, §602(2)(A)(B); Ann. Code of Maryland of 1957, Art. 33, §9-210(g); Mich. Comp. Laws Ann. §168.696(1); Minn. St. Ann. §§204B.36(2) and 202A.11; West's Ann. Miss. Code, §23-15-359(2); Vernon's Ann. Missouri St. §115.237(2); Mont. Code Ann. §§13-10-209(1)(a), 13-10-303, and 13-10-203; Nev. Rev. St. Ann. §293.267(3)(a); N.H. Rev. St. Ann. §§656:5, 656:9; N.J. St. Ann. §19:13-4; N.M. St. §1-7-6; McKinney's Consolidated Laws of N.Y. §§7-104(4)(a), 7-106; Gen. St. of N.C. §163-140; N.D. Century Code Ann. §16.1-06-05(3); Baldwin's Ohio Rev. Code Ann. §3505.03(B); Okla. St. Ann. §6-106; Ore. Rev. St. §254.135(4)(a); Purdon's Penn. St. Ann., Title 25, §2963(b); Gen. Laws of R.I. Ann., §§17-15-8 and 17-19-9.1; S.D. Codified Laws Ann. §12-16-2; Tenn. Code Ann. §§2-5-206(b) and 2-5-207(d)(1); Vernon's Texas St. and Codes Ann., Title 5, §52.065 and §52.067; Utah Code Ann. §20A-6-301; Vt. St. Ann., Title 17, §2472(b); Const. of Va., art. II, §3; Rev. Code of Wash. Ann. §29.30.020; W.Va. Code of 1966 §3-6-2; Wis. St. Ann. §5.64(b); and Wyo. St. Ann. §22-6-120(a)(vii).

[55] *See* Code of ALA. §§17-8-6 and 17-8-8; DEL. Code Ann. Rev., Title 15, §§3302; 4502(a), and 5005; Burn's IND. St. Ann. §§3-8-7-11, 3-8-6-5(b), 3-11-2-5; and 3-11-2-9; KY. Rev. St. Ann. §118.325(2)(4); N.H. Rev. St. Ann. §656:11; N.M. St. §1-7-6; McKinney's Consolidated Laws of N.Y. §§2-124, 7-104, and 7-106; OKLA. St. Ann. §6-106; and Utah Code Ann. §20A-6-301(1)(d).

allow candidates who are nominated by more than one party to have the names of all of the parties that nominated the candidate to be printed with the candidates' names. This principle is known as "fusion."[56] Among the states that allow "fusion" candidacies are California[57] and New York.[58] Other states allow short statements on the ballot. *See* N.J. St. Ann. §19:23-17.[59]

---

[56] *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 n.1 (1997).

[57] *See* West's Ann. Calif. Codes, Elections, §13105(c).

[58] *See* McKinney's Consolidated Laws of N.Y. §§6-120, 6-146(1), and 7-104(5).

[59] There is a similar provision for candidates running in municipal elections. *See* N.J. St. Ann. §40:45-10. Similarly, the State of Wisconsin provides that independent candidates shall have printed under their names on the ballot, in five words or less, the party or principle of candidate, if any. *See* Wis. St. §5.64(1)(e). In *Ihlenfeldt v. State Election Bd.*, 425 F.Supp. 1361 (D.Wis. 1977), while upholding this statutory provision, the district court pointed out that Wisconsin had the right to "organize its ballot." *Id.* at 1364 (citing *United States v. Classic*, 313 U.S. 299 (1941)). As part of that right, the court recognized that " . . . To insure that the candidates listed under the Independent heading are able to project a political identity to the electorate, Wisconsin permits them to identify themselves in five words or less . . . it insures his access to the electorate in as meaningful a way as possible." *Id.* at 1364. For other states with similar provisions, see Ariz. Rev. St. Ann. §16-341(D) (designation in three words or less); Colo. Rev. St. Ann. §1-4-601(2), §1-5-403(4) (political party or organization name may not exceed three words and they may not promote candidate or equal a campaign promise); Minn. St. Ann. §204B.36(2) and §204B.07(1)(c) (political party or principle not expressed in more than three words with candidates' names on

2. Incumbency Designations.

In addition to political party designations and emblems, some states regulate their election ballots in such a manner that some candidates are permitted to distinguish themselves with incumbency designations. In such a situation, experience is a classification the state has singled out as being more significant than other distinctions such as what action or actions candidates took or will take on matters of great public importance. In addition, incumbency designations prohibit someone with even greater experience from providing evidence of such on the ballot. Incumbency protection is not uncommon.[60]

In Minnesota, candidates for judicial office who are incumbents running for the same office may be designated on the ballot as the "incumbent." *See* Minn. St. Ann. §204B.36(5).[61] The State Supreme Court held in *Peterson v.*

---

the general election ballot); and General Laws of R.I. Ann. 1956, §17-19-9.1 (independent candidates can choose, in no more than three words, a political principle, movement or organization to identify himself with on the ballot).

[60] *See* Official Code of Ga. Ann. §21-2-284(c); §21-2-284.1(a)(b)(3); and §21-2-285(c) (1998 ed.). Furthermore, for candidates whose nomination to the same office in a precinct, ward or district contains any portion of the territory which s/he was elected to represent in the last preceding municipal or state election is considered the incumbent. Next to their names is printed, at the candidate's request, no more than eight words explaining the public offices that the candidate is currently holding or has held. *See* Mass. General Laws Ann., Ch. 53, §34. Candidates for state or city office who are also elected incumbents shall have printed with their names on Massachusetts' election ballots the words, "Candidate for Reelection." *See* Mass. General Laws Ann., Ch. 54, §41.

[61] ***See also*** Mich. Const. art. VI, §24 (incumbent Justices and judges serving on that state's various courts and who are elected on a non-partisan basis shall have printed under their name the designation of that office if they are a candidate for the

Stafford, 490 N.W.2d 418 (Minn. 1992), *cert. denied*, 507 U.S. 1033 (1993) by relying on an earlier decision in *Gustafson v. Holm*, 44 N.W.2d 443 (Minn. 1950), that,

> In *Gustafson*, we stressed the fact that the purpose of these two separate identifications is information, not to give the incumbent an advantage. The fact that this designation in a particular election may provide the incumbent with an advantage over other candidates does not necessarily invalidate the statute . . . Use of the word 'incumbent' following the candidate's name, simply informs the voter of the person who presently holds the position . . . In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.

Peterson v. Stafford, 490 N.W.2d at 423-24 (quoting *Gustafson v. Holm*, 44 N.W.2d 443, 447 (Minn. 1950)).

California also provides incumbency designations. *See* West's Ann. Calif. Codes, Elections, §13106. California provides that under the name of each candidate, the candidate may choose one of the following designations: words describing the elective office the candidate holds at the time of filing nominating papers; the word "incumbent" if the candidate is running for the same office held at the time of filing nominating papers; in three words or less describing the current principal professions, vocations, or occupations the candidate practices; or "appointed incumbent" may be printed by a candidate's name if the candidate is holding an office, other than a judicial office, because of an appointment to that office and the

---

same office); and Ore. Rev. St. §254.135(4)(c) ("The word 'incumbent' shall follow the name of each candidate for the Supreme Court, Court of Appeals, Oregon Tax Court or circuit court who is designated the incumbent by the Secretary of State under O.R.S. 254.085.").

person is a candidate for election to that same office. *See* West's Ann. Calif. Codes, Elections, §13107(a)(1)(2)(3)(4) (2000 Cum. Pocket Part).

Incumbency labeling is particularly onerous on other candidates because it recognizes only one candidate as particularly worthy of state approval. Yet, such labeling has never been deemed unconstitutional.

3. Residency Or Nicknames

In addition to party labels and emblems, and incumbency designations, states print other information on the ballot. Two examples of this other information are candidates' residences or nicknames.

In Massachusetts, for example, the address of each candidate for an elective office, for a ward or town committee, or for state committee must be printed next to their names on the ballot. *See* Mass. General Laws Ann. Ch. 53, §34. See *also* Mass. General Laws Ann., Ch. 54, §41. Alaska allows a nickname or familiar form of a candidate's proper name may be used as part of the candidate's name on the ballot. *See* Alaska St. §15.15.030(4). In Arkansas, a candidate filing for any elective office may use up to three given names, one of which may be a nickname or any other word used to identify the candidate with the voters on the ballots for primary elections. See Arkansas Code of 1987 Ann. §7-7-305(c)(1)(A). However, a candidate may not use a nickname that includes a professional or honorary title. *See* Arkansas Code of 1987 Ann. §7-7-305(c)(1)(B). Candidates may add as a prefix to their name the title or an abbreviation of an elective office the candidate currently holds. *See* Arkansas Code of 1987 Ann. §7-7-305(c)(1)(A).

4. Summation.

The foregoing examples provide a short survey of the vast array of the content of election ballots. This multitude of regulations provides state-sanctioned distinctions

among candidates. The informed voter law provides the most important ballot information to voters since the provision of information used for adoption of the Seventeenth Amendment.

Opponents of the informed voter law are concerned that candidates' actions regarding a federal term limits amendment may prove unpopular. But that is exactly why the citizens of Missouri passed that law. The self-interest of candidates precludes them from acting in accordance with the will of people. Missouri's law holds candidates accountable to the people. As this Honorable Court has stated, legislators have an obligation to take a position on a matter of public importance in order that the people whom they represent "can be fully informed by them, and be better able to assess their qualifications for office." *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966).

D. The Ballot Has Been Used To Provide Voters With Information Regarding A Candidate's Position On A Constitutional Amendment.

An informed voter law cannot be distinguished from other ballot information because it provides information about a constitutional amendment. Candidates' positions on constitutional amendments have been a vital element in selecting candidates for public office. Throughout this country's history, political parties have placed support of constitutional amendments in their platforms. Party labels therefore are shorthand for amendments supported by candidates.

For example, the Socialist Party Platform of 1960 supported an amendment that would guarantee the right of ready ballot access to minority political parties in all fifty states. *See* NATIONAL PARTY PLATFORMS, 1840-1972 at 630 (Univ. of Ill. Press, 5th ed. 1973). The Democratic Party Platform of 1964 advocated an amendment that gave the District of Columbia voting representation in Congress. *Id.* at 648. Many other parties' platforms have called for constitutional amendments. Yet, party labels

are not precluded from ballots. By including a party label on the ballot, voters have been given shorthand information regarding a candidate's commitment to supporting a specific amendment. In short, party labels – insofar as they are shorthand for party platforms – provide voters with information regarding a candidate's support of various constitutional amendments.

CONCLUSION

Missouri's informed voter law should be upheld not only because it provides ballot information similar to that used by the political parties, but because it is far more important than any other information placed on the ballot. Based on the foregoing brief, Amicus Curiae Missouri Term Limits respectfully requests that this Honorable Court reverse the judgment below.

Respectfully submitted,

STEPHEN J. SAFRANEK*
Associate Professor of Law
Ave Maria School of Law
3475 Plymouth Rd.
Ann Arbor, MI 48105-2550
(734) 827-8096

* *Legal Counsel of Record for Amicus Curiae Missouri Term Limits*

IDAHO SESSION LAWS – 1909

SEC.41. Any candidate for nomination for the office of State Senator or member of the House of Representatives may, if he chooses to do so, sign and file with his declaration of candidacy or nomination paper a declaration as follows:

"I hereby declare that during my term of office if elected, I will always vote for the candidate for United States Senator who has received a majority of the first choice votes upon my party ticket, and in the event no one has received a majority of the first choice votes, then I will vote for the candidate of my party who has received the largest number of both first and second choice votes for that position at the primary held next preceding the election of a United States Senator."

And in such case there shall be printed on the official primary ballot opposite or just below said candidate's name the following words: "Pledged to vote for party choice for U.S. Senator."

NEBRASKA SESSION LAWS – 1901

Section I. (Nomination papers, legislative candidates.) Any elector seeking nomination as a candidate for the legislature at the primaries where such candidates are chosen may include in the application to have his name placed upon the official primary ballot provided for in Section 5866 of Cobbey's Annotated Statutes for 1907 any

one of the two following statements, but if he does not do so the officer with whom the application is filed shall not, on that account, refuse to file his petition or place his name on the official ballot:

STATEMENT NO. 1.

I hereby state to the people of Nebraska as well as to the people of my legislative district, that during my term of office I will always vote for that candidate for United States senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a senator in Congress, without regard to my individual preference.

/s/ .....

(Signature of the candidate for nomination.)

If the candidate shall be unwilling to sign the above statement, then he may sign the following statement as a part of his petition:

STATEMENT NO. 2.

During my term of office I shall consider the vote of the people for United States senator in Congress as nothing more than a recommendation, which I shall be at liberty to wholly disregard, if the reason for doing so seems to me to be sufficient.

.....

(Signature of the candidate for nomination.)

Section 2. (Ballot. Legislative candidate.) That part of the official primary election ballot which contains the names of candidates for legislative nominations shall have printed thereon, immediately following the names

of those candidates whose applications include Statement No. 1, the following words, "promises to vote for people's choice for United States senator" and immediately following the names of those candidates whose applications contain Statement No. 2 the following words, "will not promise to vote for people's choice for United States senator." That form of that part of the ballot containing the names of those who are candidates for legislative nomination shall be substantially as follows:

For State Senator from_____th district. Vote for_____, Richard Smith, promises to vote for people's choice for U.S. senator.

James Brown, will not promise to vote for people's choice for U.S. Senator

William Jones.

For Representatives from _____th district. Vote for _____.

Wilbur Abie, promises to vote for people's choice for U.S. Senator.

William A. Adams.

Frank Alger, will not promise to vote for people's choice for U.S. senator.

Elton Ankeny.

Approved March 4th, 1909.

WASHINGTON SESSION LAWS – 1907

SEC. 37. Any candidate under this act for office of State Senator, or member of the House of Representatives, if he desires to do so, may sign and file with his declaration of candidacy or nomination paper, a declaration as follows:

I hereby declare to the people of the State of Washington, and particularly of my legislative district, that during my term of office I will always vote for the candidate for United States Senator who has received the highest number of votes upon my party ticket for the position at the primary election next preceding the election of United States Senator; and in such case there shall be printed on the official primary ballot, opposite or just below said candidate's name, the following: "Pledged to vote for party choice for United States Senator."

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

No. 99-929

In The

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE – PROFESSOR KRIS W. KOBACH – IN SUPPORT OF THE PETITIONER

KRIS W. KOBACH*
Associate Professor
School of Law
Univ. of Missouri – Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110-2499
(816) 235-2390

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE ... 1

ARGUMENT 2

I. ARTICLE V STIPULATES VOTING BODIES AND NUMERICAL HURDLES; IT DOES NOT PROVIDE A NORMATIVE DESCRIPTION OF APPROPRIATE DELIBERATIONS 2

II. THE USE OF CONSTITUENT INSTRUCTIONS BEFORE, DURING, AND AFTER THE FRAMING OF THE CONSTITUTION CLEARLY DEMONSTRATES THAT THE FRAMERS EXPECTED INSTRUCTIONS TO CONSTRAIN THE ARTICLE V AMENDMENT PROCESS .. 4

A. Constituent Instructions Were Common in America Prior to 1776..... 4

B. Constituent Instructions Propelled the Declaration of Independence..... 5

C. Constituent Instructions Guided Constitutional Deliberations in the American Confederation Prior to 1787 8

D. Constituent Instructions Were Used During the Framing and Ratifying of the Constitution 9

E. Numerous Framers and Ratifiers Recorded their Expectations that Future Constitutional Deliberations Would be Constrained by Instructions 11

TABLE OF CONTENTS – Continued

Page

F. Constituent Instructions Constrained Deliberations on the Earliest Constitutional Amendments, Particularly the Bill of Rights 15

G. Constituent Instructions Played an Important Role in the Adoption of the Twenty-First Amendment 17

III. THE FACT THAT THE FIRST CONGRESS CONSIDERED INSERTING A RIGHT-TO-INSTRUCT PROVISION INTO THE BILL OF RIGHTS, BUT DECLINED TO DO SO, IN NO WAY IMPLIES THAT THE FRAMERS REJECTED THE USE OF CONSTITUENT INSTRUCTIONS IN THE ARTICLE V AMENDMENT PROCESS 19

IV. THE POLITICAL CULTURE OF THE EARLY AMERICAN REPUBLIC GAVE CONSTITUENT INSTRUCTIONS DE FACTO BINDING POWER, MAKING THEM CONSIDERABLY MORE COERCIVE THAN MISSOURI'S ARTICLE VIII 23

V. The PRECEDENTS OF *HAWKE V. SMITH* AND *LESER V. GARNETT* DO NOT SUPPORT THE HOLDING OF THE EIGHTH CIRCUIT 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 17

Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999) 2, 4, 28, 29, 30

Hawke v. Smith, 253 U.S. 221 (1920) 3, 26, 27, 29

Kimble v. Swackhamer, 439 U.S. 1385 (1978) ... 27, 28, 29

Leser v. Garnett, 258 U.S. 130 (1922) 26, 27, 29

CONSTITUTIONAL PROVISIONS

U.S. Const. art. V ..... *passim*

Mo. Const. art. VIII ..... *passim*

STATUTES

1929 Mass. Acts 544-52 (1929) 18

Nev. Bill Hist., 60th Sess. (1979) 28

Oregon Laws, 2nd Special Sess. 10 (1933) 18

PRIMARY DOCUMENTS AND LEGISLATIVE MATERIALS

Bernard Bailyn ed., 1 *Pamphlets of the American Revolution, 1750-1776* (1965) 5

Documents from the Continental Congress and Constitutional Convention 1774-1789 (Library of Congress collection), at http://lcweb2.loc.gov./cgi-bin 11

TABLE OF AUTHORITIES – Continued

Page

Jonathan Elliot ed., 1, 2, 4, 5 *Elliot's Debates* (2d. ed. 1888) 9, 14, 15, 16

Max Farrand ed., 1 *The Records of the Federal Convention of 1787* (1966) 3, 10

Peter Force ed., 5, 6 *American Archives, Fourth Series* (1844, 1846) 6, 7

Worthington C. Ford et al., eds., 16 *J. Cont. Cong., 1774-1789* (1906-37) 9

Joseph Gales ed., 1 *Annals of Congress* (1834) 16, 20, 21, 22

SECONDARY AUTHORITIES

Charles A. Beard & Mary R. Beard, *A Basic History of the United States* (1944) 6, 13

Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying To Change It?* (1993) 24

George H. Haynes, 2 *The Senate of the United States* (1938) 24

Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972) 17

Having It Both Ways, DES MOINES REGISTER, Feb. 15, 1997, at A8 25

Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1 (1999) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (1930) 5, 8, 18, 24

James Madison, *The Federalist No. 10* (Garry Willis ed., 1982) 30

Colleen A. Sheehan & Gary L. McDowell, eds., *Friends of the Constitution: Writings of the "Other" Federalists 1787-1788* (1998) 12, 14

Gordon Wood, *The Creation of the American Republic, 1776-1787* (1969) 4, 23

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Kris W. Kobach is a law professor who specializes in constitutional law and American legal history at the University of Missouri – Kansas City – School of Law.[1] This brief focuses entirely on the Article V issue presented in this case. My participation as an amicus curiae does not stem from any organizational interest in upholding the amendments to Article VIII of the Missouri Constitution that were approved by Missouri voters on November 5, 1996 (hereinafter referred to as Article VIII). Rather, my participation is prompted by conclusions reached after four years of research on the use of constituent instructions in American history, and by seven years of research on the framing and meaning of Article V.

It is imperative that this Court be presented with a circumspect and accurate understanding of what the Framers intended when they drafted Article V and what their expectations were regarding the use of constituent instructions. It is with this concern in mind that I submit the following brief. The brief summarizes my historical research, presented in full in a recently-published law review article,[2] and explains how that research is relevant to the case before this Court. Because my particular expertise is limited to the Article V issue, and because it is only on this issue that I can provide this Court with information that it might not otherwise encounter, I limit my arguments accordingly.

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae or his employer (the University of Missouri), made a monetary contribution to the preparation and submission of this brief.

[2] Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1 (1999).

ARGUMENT

I. ARTICLE V STIPULATES VOTING BODIES AND NUMERICAL HURDLES; IT DOES NOT PROVIDE A NORMATIVE DESCRIPTION OF APPROPRIATE DELIBERATIONS

The holding of the Eighth Circuit U.S. Court of Appeals that Missouri's Article VIII violates Article V of the U.S. Constitution assumed a rather decisive premise: that Article V does more than simply delineate the relevant voting bodies and the numerical hurdles that must be cleared for the adoption of a constitutional amendment. As the Eighth Circuit conceived it, Article V also stipulates *how* members of Congress and state legislatures must deliberate when considering an amendment. That is, it specifies the type of decision-making environment that must exist and the permissible pressures that may influence the votes of legislators. *See Gralike v. Cook*, 191 F.3d 911, 924-26 (8th Cir. 1999).

This is a rather remarkable assumption, given the succinct wording of Article V. The text of Article V tersely specifies the voting bodies and numerical hurdles involved in the proposal and ratification of an amendment to the U.S. Constitution. It does not describe any necessary deliberative conditions; nor does it prohibit any forbidden influences on representatives' voting. Nonetheless, the Eighth Circuit assumed that Article V contains an invisible subtext presenting a normative evaluation of appropriate constitutional deliberations.

This assumption is doubly remarkable in light of the fact that the records of the Framers' deliberations on Article V contain no hint whatsoever of this purported subtext. The records offer no suggestion that the Framers sought through Article V to define permissible decision-making environments for amending the Constitution. Rather, delegates to the Philadelphia Convention were almost entirely concerned with the questions of (1) whether any provision for amending the Constitution

was necessary, (2) whether Congress or proposing conventions should have the power to propose amendments, and (3) how large a majority should be required to propose and to ratify.[3] Thus, the initial weakness of the Eighth Circuit's holding lies in the fact that it rushes to insert into Article V an unstated requirement that deliberations be free of constraint when neither the text nor the records of the 1787 Convention offer any clear basis for doing so.

Article V is no more than a positivist rule of recognition for determining when an amendment of the Constitution has taken place. Provided that the ultimate decision to propose an amendment lies in the hands of Congress (or a proposing convention), the decision to ratify lies in the hands of the state legislatures (or ratifying conventions), and the requisite majorities are achieved, then the demands of Article V are satisfied. Nothing in the text proscribes citizens from attempting to influence what is ultimately attributed to "We the People." Nor has the Supreme Court added such a proscription in the past. The Court has merely confirmed that ratification must occur through a vote of the representative assemblies stipulated in Article V, and by those assemblies only. *Hawke v. Smith*, 253 U.S. 221 (1920). It is quite another matter, however, to divine that the "spirit" of Article V also bars the people of a state from pressing their representatives to favor a particular amendment. The Eighth Circuit effectively interpreted Article V so as to insert into the constitutional text the words "all deliberations on the proposal and ratification of amendments shall be free from significant popular pressure or constraint." In reaching this conclusion, the Eighth Circuit

---

[3] *See generally* 1 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1966) [hereinafter *Convention Records*], at 22, 121-22, 202-03, 231, 476; 2 *Convention Records*. at 87, 133, 136, 152, 159, 174, 188, 467-68, 557-61, 602, 629-31, 662; 3 *Convention Records*. at 120-21, 126, 357, 367, 400, 630; *Convention Records* Supp. at 191-92, 270.

crossed the line between interpreting Article V and embellishing upon it.

The Eighth Circuit imagined, without any citation to historical authority, that "Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions." *Gralike*, 191 F.3d at 924-25 (8th Cir. 1999). As this brief attempts to demonstrate, the Eighth Circuit's conception of Article V does not accurately reflect the intentions, experience, and expectations of the Framers.

II. THE USE OF CONSTITUENT INSTRUCTIONS BEFORE, DURING, AND AFTER THE FRAMING OF THE CONSTITUTION CLEARLY DEMONSTRATES THAT THE FRAMERS EXPECTED INSTRUCTIONS TO CONSTRAIN THE ARTICLE V AMENDMENT PROCESS

A. Constituent Instructions Were Common in America Prior to 1776

Instructions were a prominent feature of American colonial politics. They were used in virtually all of the colonies, although they were most prevalent in the colonies of New England.[4] Such instructions, consisting of "directions drawn up by a body of constituents to their particular representatives," ordered the representatives to take specified positions on issues of concern.[5] Depending on which representatives were being instructed, the instructions might come from voters assembled in town meetings, voters in county meetings, or state legislatures. In Massachusetts, the power of constituents to instruct

---

[4] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 27-37.

[5] Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 189 (1969).

their representatives was deemed a "sacred and unalienable" right under the common law.[6] At the First and Second Continental Congresses, virtually all of the delegates were bound by instructions from their respective states, in order, as the Virginia assembly put it, "[t]hat they may be better informed of our sentiments, touching the conduct we wish them to observe on this important occasion."[7]

By the 1760s, such instructions had become deeply entrenched in the political life of the colonies and carried de facto binding force. In most colonies no formal legal mechanism compelled the representative to obey his instructions. Nonetheless, as Daniel Dulany wrote, "their persuasive influence in most cases may be, for a representative who should act against the explicit recommendation of his constituents would most deservedly forfeit their regard and all pretension to their future confidence."[8] Such statements reflected the political scruples of the age; it was virtually unthinkable for a representative to disregard his constituent's instructions. The only tolerable choices were to obey one's instructions or to resign from office.

B. Constituent Instructions Propelled the Declaration of Independence

The seminal constitutional act of the American Republic – the Declaration of Independence – was the product of constituent instructions. Sentiment in favor of the break with Great Britain emanated upward from the local and colonial level, rather than downward from the

---

[6] *See* Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (1930).

[7] Luce, *Legislative Principles* at 451.

[8] Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising a Revenue, by Act of Parliament* (1765), *reprinted in* 1 *Pamphlets of the American Revolution, 1750-1776*, at 608 (Bernard Bailyn ed., 1965).

Continental Congress.[9] Nor was the cause of independence taken up eagerly or quickly. In April of 1776, a year after warfare had erupted at Lexington and Concord, independence was still widely perceived as an unsatisfactory alternative to reconciliation with the mother country.[10] Arguably, in such an environment, independence could not have been imposed from above by the Continental Congress; only instructions from below could confirm the shift in sentiment and the popular legitimacy of the cause.

North Carolina acted first. On April 12, 1776, the Provincial Congress of North Carolina, taking into account "the usurpations and violences attempted and committed by the King and Parliament of Britain against America,"[11] passed the following instruction:

> Resolved, That the Delegates for this Colony in the Continental Congress be empowered to concur with the Delegates of the other Colonies in declaring Independency, and forming foreign alliances, reserving to this Colony the sole and exclusive right of forming a Constitution and Laws for this Colony. . . . [12]

Although the resolve was worded permissively, with the colony's delegates "empowered" rather than affirmatively commanded to pursue independence, the extensive list of grievances preceding the instruction made clear the intent that the delegates were to vote for independence as soon as the concurrence of the other colonies could be

---

[9] Charles A. Beard & Mary R. Beard, *A Basic History of the United States* 106 (1944).

[10] *See id.* at 104-106.

[11] Independence in North Carolina (April 12, 1776), *reprinted in* 5 *American Archives, Fourth Series* 859 (Peter Force ed., 1844).

[12] *Id.* at 860.

secured.[13] Delegates at the General Convention of Virginia acted next, on May 15, 1776. The convention voted unanimously to instruct its delegates in the Continental Congress "to propose to that respectable body to declare the United Colonies free and independent States; absolved from all allegiance to, or dependance [sic] upon, the Crown or Parliament of *Great Britain*. . . . "[14]

The New York Convention followed suit on May 15.[15] Meanwhile, town after town issued pro-independence instructions to representatives in the Massachusetts assembly during May and June of 1776.[16] Such instructions ultimately compelled the colonial assembly to favor independence and to instruct its delegates to the Continental Congress accordingly. By the end of June, 1776, delegates from at least nine colonies – Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, North Carolina, Pennsylvania, and Virginia – had been instructed to vote for independence.[17] This series of events offers considerable support for the view that the founding generation regarded it as entirely appropriate for constituents to bind their representatives on constitutional matters. Indeed, not only did they deem it appropriate, they judged it vitally necessary. If they were going to set a legitimate constitutional course for the nation, the will of the people would have to fill the sails.

---

[13] *See id.* at 859-860.

[14] Records of the Virginia Convention (May 15, 1776), *reprinted in* 6 *American Archives, Fourth Series* 1523, 1524 (Peter Force ed., 1846) [hereinafter 6 *American Archives*].

[15] Records of the New York Provincial Congress (May 15, 1776), *reprinted in* 6 *American Archives* at 1364.

[16] Kobach, *May "We the People" Speak?*, 33 U.C. Davis L. Rev. at 40-42.

[17] *See id.* at 38-47.

C. Constituent Instructions Guided Constitutional Deliberations in the American Confederation Prior to 1787

After independence, the frequent use of instructions in the conduct of public affairs continued, both at the state level and at the national level in the Continental Congress and the Congress of the Articles of Confederation. In the months immediately following the Declaration of Independence, the fledgling nation operated in a constitutional vacuum. This void had to be filled quickly and systematically. Not surprisingly, virtually all of the states used constituent instructions in fashioning their state constitutions.[18]

The Articles of Confederation took nearly five years to complete. The states utilized constituent instructions in shaping the Articles from the very start, even in calling for the Articles in the first place.[19] Although the Articles of Confederation contained no explicit provisions regarding the right to instruct delegates on either constitutional matters or routine statutory matters, the right was assumed by state legislatures. Such an assumption was natural, given the long history of constituent instructions in America and the fact that state legislators were themselves routinely instructed by their constituents. The instruction of representatives in the Confederation Congress was a common practice.[20] Indeed, two of the men who would later draft the *Federalist Papers* – John Jay and James Madison – were instructed on numerous occasions by the state of Virginia.[21] And such notable members of the founding generation as John Hancock, Samuel Adams, and Elbridge Gerry were regularly instructed by

---

[18] *Id.* at 49.

[19] *Id.* at 51.

[20] *Id.* at 53-55.

[21] *See* Luce, *Legislative Principles* at 455-56.

the state of Massachusetts.[22] Madison plainly regarded constituent instructions as an intrinsic part of Congress's operations. This was evident in his arguments against a particular voting rule in April 1787, less than a month before the Constitutional Convention was to begin, when he warned that the rule in question could operate to defeat the carrying out of constituent instructions.[23]

D. Constituent Instructions Were Used During the Framing and Ratifying of the Constitution

In early 1787, constituent instructions again changed the course of American history. The members of Congress from New York had been instructed by their legislature to propose that Congress call a new constitutional convention subsequent to the Annapolis Convention of 1786 – one that would have the sanction of Congress.[24] On February 21, 1787, they carried out their instructions and moved that a new convention be called. After "some little discussion" and an initial vote against the motion, it passed.[25] In authorizing the convention by Resolution, Congress acknowledged the pivotal role that instructions had played in prompting congressional action: "[S]everal of the States, and particularly the State of New York, by express instructions to their Delegates in Congress, have suggested a Convention for the purposes expressed in the

---

[22] *See, e.g.*, 16 *J. Cont. Cong.*, 1774-1789, at 276-77 (Worthington C. Ford et al., eds., 1904-37) (Mar. 22, 1780).

[23] 5 *Elliot's Debates* 104 (Jonathan Elliot 2d ed., 1888) (April 25, 1787). The rule against which Madison argued prohibited the raising of a question previously voted on, unless at least an equal number of states were present when the question was revived. *See id.* at 103-04.

[24] 5 *Ellict's Debates* 97 (Jonathan Elliot 2d ed., 1888) (Feb. 21, 1787).

[25] *Id.*

following Resolution. . . . "[26] With these words, the Confederation Congress documented the now all-but-forgotten fact that constituent instructions were directly responsible for the calling of the Philadelphia Convention.

Perhaps the most compelling evidence of the Framers' expectations regarding the role of constituent instruction in the process of constitutional amendment is the fact that some of the Framers were operating under instructions when they drafted Article V, itself. The delegates who came to Philadelphia from Delaware were acting under explicit instructions from their state legislature. In February 1787, the Delaware legislature commissioned George Read, Gunning Bedford, John Dickinson, Richard Bassett, and Jacob Broom to represent the state in Philadelphia. The same act also instructed the delegates. Their instructions forbade them from altering the Fifth Article of the Articles of Confederation, which provided that each state had a single, equal vote in Congress.[27]

It is difficult to overstate the importance of the Delaware instructions. The convention records taken by James Madison and Robert Yates both make special note of the Delaware instructions, which were read to the assembled convention, along with the credentials of all of the delegates on the first day of business.[28] This early positioning had a marked impact on the final shape of the Constitution that emerged. The Delaware delegates' entrenchment on the view that all states, large or small, should have an equal vote in Congress fueled the smaller states' resistance to proportional representation and was thus critical to the emergence of the compromise providing for equal representation in the Senate.

Instructions not only constrained several of the Framers of the Constitution in Philadelphia, they also

---

[26] 3 *Convention Records* 13-14.

[27] 3 *Convention Records* 574-75.

[28] 1 *Convention Records* 4, 6.

constrained the ratifiers in the state conventions. Many delegates to the state ratifying conventions were bound by strict instructions from their constituents. This was perhaps most evident at the Maryland ratifying convention. When one of the delegates who opposed the Constitution attempted to propose several amendments to it, he was interrupted by thirteen delegates who declared:

> that they were elected and instructed by the people they represent, to ratify the proposed constitution, and that as speedily as possible, and to do no other act; that after the ratification their power ceased, and they did not consider themselves as authorized by their constituents to consider any ammendments [sic.][29]

This body of pro-Constitution delegates adhered rigidly to their instructions, and in the face of arguments against the Constitution "remained inflexibly silent."[30] The relevance of such instructions to the present case is considerable. The argument that the Framers and ratifiers of the Constitution intended there to be no constraining of constitutional deliberation via constituent instructions rings rather hollow in light of the fact that many Framers and ratifiers were themselves so constrained.

E. Numerous Framers and Ratifiers Recorded their Expectation that Future Constitutional Deliberations Would be Constrained by Instructions

Undertaking the constitutional deliberations of 1787 with some delegates under charge of instruction was not

---

[29] Records of the Maryland Ratifying Convention, *reprinted in* Documents from the Continental Congress and Constitutional Convention (Library of Congress collection), at http://lcweb2.loc.gov/cgi-bin (April 21-26, 1788).

[30] *Id.*

regarded as problematic or improper by the Framers.[31] Indeed, numerous post-convention writings by various Framers addressed the issue of constituent instructions directly, confirming that they would, and should, happen routinely in the future. Most of these statements occurred during the ratification debates that followed the convention. Perhaps the most illustrative explanation of the role that instructions would play in the amendment process under the new Constitution came from John Dickinson of Delaware. After summarizing the hurdles set up by Article V, he wrote the following description:

> Thus, by a gradual progress, we may from time to time *introduce every improvement in our constitution*, that shall be suitable to our situation. For this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations respectively required by them, and *to enjoin their representatives, to employ every proper method to obtain a ratification*.[32]

A state would "enjoin" its representatives via instructions. This term, which was used interchangeably with "instruct," reflected just how powerful the binding force of constituent instructions could be at the time of the framing.

Rufus King, who had been a Massachusetts delegate to the Philadelphia Convention, emphasized this fact in order to assuage the fears of wavering delegates at the Massachusetts ratifying convention. He insisted that

---

[31] For a description of an oblique reference to instructions during the Convention by James Wilson and James Madison, *see* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 59.

[32] John Dickinson, *The Letters of Fabius*, No. VII (1788), *reprinted in Friends of the Constitution: Writings of the "Other Federalists"* 1787-1788 (Colleen A. Sheehan and Gary L. McDowell, eds.) 496 (1998) (emphasis in last sentence added).

members of the new Congress would not be able to disregard their constituents' instructions:

> The State Legislatures, if they find their delegates erring, can and will instruct them. Will not this be a check? When they hear the voice of the people solemnly dictating to them their duty, they will be bold men indeed to act contrary to it. These will not be instructions sent them in a private letter, which can be put in their pockets; they will be public instructions, which all the country will see; and they will be hardy men indeed to violate them.[33]

King's statement is particularly relevant to the present case. He stressed that the *public* nature of the instructions, combined with the disrepute into which any disobedient representative would fall, gave the instructions their binding force. And he spoke approvingly of the public shame that would attach to any errant representative. Disobedience of such instructions was not only dishonorable, it was political suicide. Thus, it is unlikely that King, Dickinson, or their contemporaries would have objected to the use of ballot notations to inform voters whether or not their representatives had heeded their instructions.

Among the other Framers who assured skeptics of the Constitution that the people and the states could use instructions to press for amendments was Alexander Hamilton, who faced a New York Convention that was leaning against ratification.[34] Hamilton was attempting to assuage New York ratifiers who felt that the size of the Congress was too small. He made clear his expectation that, when such amendments were needed, instructions

---

[33] Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 60.

[34] *See* Charles A. Beard & Mary R. Beard, *A Basic History of the United States* 136 (1944).

would be given and Members of Congress would be bound to follow them: "If the general voice of the people be for an increase [in the number of Members of Congress], it undoubtedly must take place. They have it in their power to instruct their representatives; and the State Legislatures, which appoint the Senators, may enjoin it also upon them."[35]

Other Federalist defenders of the proposed Constitution insisted that certain specific reforms desired by opponents of the Constitution could eventually be secured via the use of instructions. For example, Trench Coxe used this argument when he published essays in defense of the Constitution during the Pennsylvania ratification debates. In answering critics who charged that the right to trial by jury would not be secure under the Constitution, Coxe insisted that congressional regulation of the new federal courts would be shaped by "[t]he known principles of justice, the attachment to trial by jury whenever it can be used, the instructions of the state legislatures, the instructions of the people at large. . . ."[36] Coxe's prediction was accurate: instructions were indeed used subsequently to shore up the jury right via the Sixth and Seventh Amendments, as described below. In this way, numerous defenders of the Constitution promised wavering ratifiers that constituent instructions would continue to shape the process of constitutional amendment under Article V.

---

[35] Alexander Hamilton's statement before the New York ratifying convention (June 21, 1788), *reprinted in* 2 *Elliot's Debates* 252 (2d ed., 1888)

[36] Trench Coxe, *An American Citizen: An Examination of the Constitution of the United States*, No. IV (1788), *reprinted in Friends of the Constitution: Writings of the "Other Federalists"* 1787-1788 (Colleen A. Sheehan and Gary L. McDowell, eds.) 472 (1998).

F. Constituent Instructions Constrained Deliberations on the Earliest Constitutional Amendments, Particularly the Bill of Rights.

Perhaps the most convincing evidence that the Framers did not regard constituent instructions as impermissible under Article V is the fact that instructions constrained the proposal of the Bill of Rights – the first occasion on which Article V was employed. After ratification of the Constitution, many of the Framers were subsequently elected to serve in the new Congress and were bound by instructions to seek the proposal of the Bill of Rights. This was part of an explicit quid pro quo, whereby the conventions of reluctant states would agree to ratify the new Constitution in exchange for congressional proposal of a Bill of Rights and other amendments. The deal, which first took shape at the Massachusetts ratifying convention, was secured by instructions that constrained numerous Members of the First Congress.

The ratifying conventions of four states – Massachusetts, South Carolina, New York, and Rhode Island – inserted such instructions prominently in their ratification messages to Congress. Other states, such as New Hampshire, instructed their Members of Congress in subsequent acts. Consider the instructions issued by the South Carolina convention. After listing the state's desired alterations to the Constitution, the ratification message stated the following: "*Resolved*, That it be a standing instruction to all such delegates as may hereafter be elected to represent this state in the general government, to exert their utmost abilities and influence to effect an alteration of the Constitution, conformably to the aforegoing resolutions."[37]

As under the Articles of Confederation, there was no mistaking the de facto binding power of such instructions. They exerted a powerful coercive effect upon members of the First Congress. As Massachusetts Representative

---

[37] Ratification Message of S.C. (May 23, 1788) (emphasis in original), *in* 1 *Elliot's Debates* 325 (2d ed. 1888).

Elbridge Gerry, who had been a delegate at the 1787 Convention, stated before Congress on July 21, 1789:

> The members from Massachusetts were particularly instructed to press the amendments recommended by the convention of that State at all times, until they had been maturely considered by Congress; the same duties were made incumbent on the members from some other States; consequently, any attempt to smother the business, or prevent a full investigation, must be nugatory. . . . [38]

Plainly, such instructions played a critical role in pressing Congress to propose the Bill of Rights. If any episode demonstrates most clearly how the Framers envisioned that Article V would work, then this is it. This amendment process occurred immediately after the adoption of the Constitution; and most of the Framers took part in it, either as members of Congress or as members of their state ratifying conventions.

In all, the ratifying conventions of seven states – Massachusetts, South Carolina, New York, Rhode Island, New Hampshire, Virginia, and North Carolina – conditioned their ratification of the U.S. Constitution on the proposal of particular amendments.[39] The first five in this list explicitly instructed their members of Congress to press for the desired amendments. The two others, Virginia and North Carolina, issued general statements from their ratifying conventions that called for amendments but did not explicitly instruct their congressional delegations.[40]

Constituent instructions continued to constrain the constitutional amendment process after the adoption of

---

[38] Elbridge Gerry (July 21, 1789), *in* 1 *Annals of Congress* 688 (Joseph Gales ed., 1834).

[39] Statement of Senator Van Buren (1826), *in* 4 *Elliot's Debates* 489 (2d ed. 1888).

[40] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 63-66.

the first ten amendments. Less than a month after the 1793 decision of the Supreme Court in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the legislatures of Massachusetts and Virginia instructed their Senators to seek a constitutional amendment denying federal courts jurisdiction over suits by citizens against states. Connecticut and North Carolina followed soon thereafter, and in January 1794, the resolution that would become the Eleventh Amendment in 1798 was introduced on the Senate floor.[41] Constituent instructions also drove the proposal of the Twelfth Amendment. In the wake of the Jefferson – Burr contest for the Presidency in 1800-01, the legislature of New York instructed its Senators to press for a revised system of electing Presidents. New Hampshire, Vermont, and Massachusetts joined New York and instructed their Senators to favor the electoral system reforms that would become the Twelfth Amendment, proposed by Congress in December 1803.[42]

G. Constituent Instructions Played an Important Role in the Adoption of the Twenty-First Amendment

Although the use of constituent instructions waned in the late nineteenth century, in 1928 and 1933, citizens reasserted their power to compel their representatives in Congress to set Article V into motion. Referendum voters in several states pressed Congress to repeal the prohibition amendment. This pressure occurred via instructions, petitions, and requests.[43] Massachusetts voters instructed their State Representatives and Senators, who in turn requested the President and Congress to amend the U.S. Constitution. In the November 1928 election, voters in thirty-six of the state's forty senatorial districts were presented with

---

[41] Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 65 (1972).

[42] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 71.

[43] *See id.* at 82-85.

the following ballot question: "Shall the senator from this district be instructed to vote for a resolution requesting Congress to take action for the repeal of the Eighteenth Amendment to the Constitution of the United States, known as the prohibition amendment?"[44] A majority of voters approved the proposition in all but two of the senate districts.[45]

In addition to partly driving the proposal of the Twenty-first Amendment by Congress, constituent instructions played an important role in shaping the second stage of the Article V process – ratification. The Twenty-first Amendment is the only constitutional amendment that Congress has ever sent to state conventions for ratification, rather than to the state legislatures. Importantly, constituent instructions were used once again to constrain the voting of delegates. In the state of Oregon, voters took the opportunity to instruct their convention delegates how to vote. On July 21, 1933, a special referendum was held to decide the following ballot issue:

> AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA – Purpose: To instruct the delegates to the constitutional convention as to whether the electors of the respective counties of the state of Oregon desire the amendment of the constitution of the United States by the adoption of the proposed article of amendment:
>
> [text of proposed Twenty-first Amendment.]
>
> Vote YES or NO
>
> Yes. I vote for the proposed amendment.
>
> No. I vote against the proposed amendment.[46]

---

[44] 1929 Mass. Acts 544-52 (1929). Voters were presented with a similar ballot issue regarding the instruction of their Representatives in the Massachusetts House. *See id.* at 552.

[45] *Id.* at 544-52. Luce, *Legislative Principles*, at 476-77.

[46] 1933 Oregon Laws, 2nd Special Sess. 10 (1933).

The overwhelming majority of voters voted yes, in favor of ratification.[47] Seventeen days later, on August 7, 1933, the convention ratified the Twenty-first Amendment.[48]

III. THE FACT THAT THE FIRST CONGRESS CONSIDERED INSERTING A RIGHT-TO-INSTRUCT PROVISION INTO THE BILL OF RIGHTS, BUT DECLINED TO DO SO, IN NO WAY IMPLIES THAT THE FRAMERS REJECTED THE USE OF CONSTITUENT INSTRUCTIONS IN THE ARTICLE V AMENDMENT PROCESS

When considering the package of amendments that was to become the Bill of Rights, the First Congress considered inserting an instructions provision into what would become the First Amendment and decided against doing so. The Respondents in this case have noted that fact and have drawn the rather superficial and illogical conclusion that if an instructions provision wasn't included, instructing must be constitutionally prohibited. Br. of Resp. in Opp. to Writ of Cert., 13-14. In fact, the congressional rejection of an express "right to instruct" provision was largely an acknowledgement of the fact that such a clause would be unnecessary. Instructions were already occurring without any constitutional invitation.

The suggestion of including a right-to-instruct provision in the Bill of Rights was a response to fears expressed at the time of ratification that the new and more powerful Congress might abandon the prevailing political norm of obedience to instructions and start exercising its augmented powers without regard to the wishes of the people.[49] Proposed by Representative Thomas Tucker of South Carolina on August 15, 1789, the instructions provision

---

[47] *Id.* The statewide totals were 136,713 in favor of the amendment and 72,854 against, or 65 percent in favor. *Id.*

[48] *Id.*

[49] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 66.

would have been inserted into the text of what eventually became the First Amendment. The proposed language declared the right of the people "to instruct their representatives."[50] There was considerable confusion in the ensuing debate about what effect this amendment would have. Instructions had long been prominent on the American political landscape, and many Members of the First Congress were already operating under charge of instruction. Thus it was unclear what the amendment was intended to accomplish.

Most Congressmen apparently believed that Tucker's amendment would have the effect of making instructions formally binding, such that a Member's refusal to vote in accordance with his instructions would either invalidate his vote or invalidate the entire law being voted upon. James Jackson of Georgia reasoned that, under the proposed amendment, any member of Congress who votes against his instructions "commits a breach of the constitution."[51] The precise consequences of such a breach were unclear, but Jackson did not want to travel down the path: "In short, it will give rise to such a variety of absurdities and inconsistencies, as no prudent Legislature would wish to involve themselves in."[52] Thomas Stone of Maryland attempted to explore and define those absurdities: "I venture to assert, without diffidence, that any law passed by the Legislature would be of no force, if a majority of the members of this House were instructed to the contrary, provided the amendment became part of the constitution."[53]

Most Members of Congress preferred to stick with the status quo, under which instructions were satisfactorily enforced by informal norms. As Jackson put it, "Let the

---

[50] 1 *Annals of Cong.* 761 (Joseph Gales ed., 1834).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 767.

people consult and give their opinions; let the representative judge of it; and if it is just, let him govern himself by it as a good member ought to do; but if it is otherwise, let him have it in his power to reject their advice."[54] The argument that it was unnecessary to make instructions constitutionally binding, and that doing so would be problematic in practice, gained momentum as the debate proceeded.[55]

James Madison opposed the amendment. If, as most of his colleagues believed, the amendment would make instructions formally and legally binding, then what would happen to a Congressman who disregarded his instructions? "Suppose he refuses, will his vote be the less valid, or the community be disengaged from that obedience which is due to the laws of the Union?"[56] On the other hand, Madison argued, if the proposed amendment merely stated the right of constituents to instruct their representatives, who were free to disregard such instructions at their peril, then it was unnecessary to insert the proposed text into the Constitution. The right to instruct was already provided for under the freedom of speech.[57]

In Madison's view, this ambiguity of meaning offered another strong reason to oppose Tucker's instruction provision. Such uncertain language would jeopardize the ratification of the entire amendment package. He pointed to

---

[54] *Id.* at 764.

[55] At the outset of the debate, two Members remarked in general terms about the desirability or undesirability of constituent instructions in a democracy. However, this more general line of discourse was not the focal point of debate, and it was not taken up in any significant way by others in the chamber. See the remarks of Representative Thomas Hartley of Pennsylvania in opposition to the use of instructions, *id.* at 761-62, and the remarks of John Page of Virginia in favor of the use of instructions, *id.* at 762-63.

[56] *Id.* at 766-67.

[57] *Id.*

"the difficulties arising from discussing and proposing abstract propositions, of which judgment may not be convinced."[58] He favored keeping the list of amendments straightforward and easily understandable: "I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[59] Madison repeated this argument once again at the end of the floor debate, just before the question was called.[60] When the vote finally came, the proposed amendment language was defeated, with 10 in favor and 41 opposed.[61]

Although a solid majority in the House of Representatives voted against inserting the proposed right-to-instruct language into what would become the First Amendment, this vote was plainly not a rejection of the practice of constituent instructions. Madison's argument regarding the constitutional uncertainty that would attach to laws passed in disobedience to instructions evidently persuaded his House colleagues, as did the argument that such a clause was unnecessary. The tradition of constituent instructions was well established in the fledgling republic, and indeed many Members of the First Congress were already operating under charge of instruction when considering the proposal of the Bill of Rights. The political scruples of the era were more than sufficient to enforce constituent instructions without venturing into the constitutional thicket of making disobedience a violation of the Constitution.

---

[58] *Id.* at 766.

[59] *Id.*

[60] *See id.* at 775.

[61] *Id.* at 776.

IV. THE POLITICAL CULTURE OF THE EARLY AMERICAN REPUBLIC GAVE CONSTITUENT INSTRUCTIONS DE FACTO BINDING POWER, MAKING THEM CONSIDERABLY MORE COERCIVE THAN MISSOURI'S ARTICLE VIII.

Given the dominant role played by constituent instructions in our nation's constitutional history and in the Framers' vision of how Article V would operate, Respondents cannot reasonably claim that the Framers deemed instructions impermissible under Article V. However, one might argue that the addition of ballot notations in Missouri's Article VIII makes the modern instructions so much more coercive than the instructions of the eighteenth century that they are impermissible under Article V.

This argument is untenable, however, in light of the overwhelming coercive effect that eighteenth-century instructions possessed. As noted in the preceding section, the political culture of the period demanded resignation as the price of disobedience. The coercive effect of constituent instructions in such an environment certainly equaled or exceeded the coercive effect of the modern instructions combined with ballot notations. The political scruples of the framing era made it all but impossible for representatives to disobey their instructions. As the *Continental Journal* of Boston put it in 1778, "no member will venture to counteract the declared sentiments of his constituents; as, besides its being a breach of trust, it would infallibly ruin his interest among them."[62] If a representative disagreed so strongly with his instructions that he could not bring himself to follow them, the political mores of the period demanded resignation before disobedience. This was demonstrated vividly during the framing of the Maryland constitution in 1776, when the delegates Carroll, Chase, and Worthington found their constituents' instructions to

---

[62] *Continental Journal*, Oct. 15, 1778, *quoted in* Wood, *Creation of the American Republic, 1776-1787*, at 192 (1969).

be "extremely against their inclinations."[63] All three felt compelled to resign rather than disregard their instructions.[64]

The binding power of constituent instructions remained substantial through the first half of the nineteenth century. Two future Presidents – John Quincy Adams of Massachusetts (in 1807) and John Tyler of Virginia (in 1836) – resigned from the Senate when their instructions from their state legislature conflicted with their strongly-held personal views.[65] In resigning his seat Tyler wrote, "I now reaffirm the opinion at all times heretofore expressed by me, that instructions are mandatory, provided they do not require a violation of the Constitution or the commission of an act of moral turpitude."[66] Tyler was not alone; six other Senators declined to follow their states' instructions on the same issue and resigned.[67] Similar commentary on the binding nature of instructions may be found scattered throughout the political writings of the early Republic.[68]

The historical record described above establishes that eighteenth- and early-nineteenth-century instructions had

---

[63] Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 49.

[64] *Id.*

[65] Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying To Change It?*, at 123.

[66] Niles' Register, 50, *cited in* Luce, *Legislative Principles*, at 469.

[67] The issue was a Senate resolution expunging the vote of censure against President Jackson from the Senate record. Tyler opposed the resolution. 2 George H. Haynes, *The Senate of the United States* 1025-31 (1938); Luce, *Legislative Principles*, at 468-70.

[68] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 57-58, 60-61, 76-77.

a coercive effect on the voting and behavior of representatives. An instruction issued in such a political culture could not be ignored. The representative regarded himself as duty-bound to follow his instructions. Today, such political scruples have all but evaporated. Although the citizens of Missouri could not re-create the political mores of the past, they could at least give themselves notification when politicians evaded their instructions. Their lack of trust was vindicated in February 1997, when Representatives obscured their opposition to congressional term limits by voting on several variations of the amendment, allowing them to vote in favor of at least one, secure in the knowledge that none would pass.[69] Instructions paired with ballot notations make such misrepresentation difficult to pull off.

Ultimately, the argument that ballot labels make the instructions too coercive is specious for three reasons. First, the text of Article V does not invite judicial scrutiny of the myriad external sources of coercion that may affect voting in Congress or the Missouri legislature.[70] Second, the Framers and ratifiers were plainly willing to tolerate instructions in a political culture that gave them significant coercive effect. Third, Missouri's Article VIII, when it was presumed to be in effect, empirically did not succeed in compelling Missouri's Representatives in Congress to follow their instructions. For example, Representative Jo Ann Emerson of Missouri declared on the Floor of the House

---

[69] "Everybody in the U.S. House got a chance to vote 'yes' on term limits Wednesday, while comfortably aware that the measure wouldn't pass." *Having It Both Ways*, DES MOINES REGISTER, Feb. 15, 1997, at A8. Members were offered eleven variations of term limit amendments to vote on, giving them the opportunity to tell their constituents that they voted for term limits, though they knew that no one proposal would receive a two-thirds majority. *Id.*

[70] Such external pressure may come from voters, lobbyists, financial contributors, the executive branch, the news media, and other sources.

that she intended to depart from her constituents' instructions.[71]

V. THE PRECEDENTS OF *HAWKE V. SMITH* AND *LESER V. GARNETT* DO NOT SUPPORT THE HOLDING OF THE EIGHTH CIRCUIT.

Unable to marshal any historical support for its insertion of an unconstrained-deliberation requirement into Article V, the Eighth Circuit sought justification in the Supreme Court precedents of *Hawke v. Smith*, 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130, 137 (1922). In *Hawke*, the Court considered whether Article V permitted the state of Ohio to make the ratification of proposed amendments to the U.S. Constitution subject to voter approval in a statewide referendum. *Id.* at 225. The Ohio constitution had transferred to the citizens final, direct authority to ratify constitutional amendments. The Court's decision turned on the question of what the Framers of Article V meant in requiring ratification by "legislatures." Concluding that the Constitution refers to action by the representative bodies of the several states in those provisions where it calls for action by state legislatures, the Court reasoned Ohio could not constitutionally substitute a binding popular vote on ratification for ratification by the state's legislature. *Id.* at 227-28.

Plainly, the *Hawke* decision is not dispositive on the question of the constitutionality of Article VIII. Where the Ohio procedure attempted to fully transfer the ratification power to the people through a direct popular vote on the amendment, Article VIII leaves the final ratification decision in the hands of the legislators. Moreover, the Court in *Hawke* never implied that an instructed legislature would not constitute a "Legislature" within the meaning of Article V. The same may be said of the Court's holding in *Leser*

---

[71] 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson), *cited in* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 23-24.

v. Garnett, 258 U.S. 130, 137 (1922), in which the Court reiterated its view that the ratification power is not subject to alteration by the people of a state. In that case, the Court rejected the claim that a state legislature lacked the power to ratify the Nineteenth Amendment if the amendment would be invalid under the state's constitution. *Id.*

The Eighth Circuit relied on *Hawke* and *Leser* to reach its constricted view of Article V in spite of the fact that in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), Justice Rehnquist, acting as Circuit Justice, had revisited the holding in *Hawke* and *Leser* and reached the conclusion that Article V did not bar the people from guiding the amendment process. The question in *Kimble* was whether the citizens of Nevada could hold an "advisory" referendum on the Equal Rights Amendment to guide their state legislators in deciding whether to ratify the Amendment. *Id.* Justice Rehnquist explicitly rejected any reading of *Hawke* and *Leser* that required the insulation of ratifying legislatures from the popular expression of opinion on such issues:

> [A]pplicants' reliance upon this Court's decisions in *Leser v. Garnett* and *Hawke v. Smith* is obviously misplaced. Both seem to me to stand for the proposition that the two methods for state ratification of proposed constitutional amendments set forth in Art. V of the United States Constitution are exclusive. . . .
>
> Under the Nevada statute in question, ratification will still depend on the vote of the Nevada Legislature. . . . I would be most disinclined to read either *Hawke*, *supra*, or *Leser*, *supra*, or Art. V as ruling out communication between the members of the legislature and their constituents. *Id.* at 1387-88 (citations omitted).

As Justice Rehnquist concluded, provided that the ultimate decision to ratify lies in the hands of state representatives, Article V in no way prohibits popular attempts to guide legislators in their decision making. The massive pressure on Nevada legislators to obey the will of the people generated by the referendum did not violate Article

V because "ratification [would] still depend on the vote of the Nevada legislature." *Id.* at 1387. Similarly, as long as the ultimate decision to vote for or against the proposal of a term limits amendment lies in the hands of Missouri's Members of Congress, Article V in no way prohibits the people of Missouri from encouraging them to do so.

The Eighth Circuit attempted to distinguish *Kimble* by stressing the non-binding nature of the Nevada referendum. Members of the Nevada legislature were "free to disregard" the popular verdict delivered by the referendum. *Gralike,* 191 F.3d at 925. This characterization is, of course, misleading. Although Nevada's referendum on ratifying the Equal Rights Amendment was merely advisory de jure, it was binding de facto. The popular verdict had a pronounced effect on the Nevada legislature, making it politically impossible for most legislators to vote in favor of ratification. Nevada voters handed the Equal Rights Amendment a staggering defeat in the referendum, with 67 percent opposed. Consequently, Nevada legislators were decidedly unwilling to support it in the face of this popular verdict: both the Senate and the Assembly declined to even bring the Amendment to a floor vote.[72]

The likely persuasive effect of Article VIII on representatives would be no greater than that of Nevada's referendum. In the wake of Nevada's unequivocal popular verdict on the ERA, it was difficult for state representatives to ignore the vox populi. Article VIII utilizes direct democracy in the same way to present legislators with clear instructions regarding the term limits issue. The coerciveness of any referendum, be it advisory, an instruction, or otherwise, depends on a variety of factors.[73] Thus, the

---

[72] Nev. Bill Hist., 60th Sess. (1979).

[73] For example, a landslide result expresses the will of the voters more convincingly than does a 51 percent majority. Thus, it is not unreasonable to suppose that a legislator in a state that approved an instruct-and-inform law by a slim majority would be more willing to disregard the will of the electorate than a

mere characterization of a referendum as "advisory" does not necessarily make it easy for legislators to ignore.

At their core, the instruct-and-inform laws embody communication between constituents and representatives – communication designed to express the preferences of the former and influence the voting of the latter. Similar communication was at issue in *Kimble*. As Justice Rehnquist concluded, "I would be most disinclined to read either *Hawke*, . . . or *Leser*, . . . or Article V as ruling out communication between the members of the legislatures and their constituents." 439 U.S. at 1387-88. Justice Rehnquist declined to construe these precedents as a blanket rejection of "citizen participation in the amendatory process." *Id.* at 1387. Plainly, the Eighth Circuit was overreaching when it used the *Hawke* and *Leser* precedents to reach the conclusion that Article V "resists any attempt by the people to restrict the legislatures' actions." 191 F.3d at 925.

CONCLUSION

In summary, the holding of the Eighth Circuit is based on a deeply flawed and ahistorical understanding of what the Framers of Article V actually contemplated. It is no exaggeration to state that the U.S. Constitution is largely the product of constituent instructions. Instructions thoroughly permeated the constitutional deliberations of the Framers' era. As James Madison envisioned, the "public voice pronounced by the representatives of the people" would govern the new republic.[74]

---

legislator faced with a 70 percent majority in a so-called advisory referendum.

[74] *Id.* at 47. Under the Madisonian vision, elected representatives would refine and relay the preferences of their constituents, not be insulated from such preferences. As Madison wrote, such representatives would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best determine the

The Eighth Circuit's assertion that Article V prohibits constituents from constraining "freely deliberative [legislative] bodies," 191 F.3d 924, is simply incredible, given the staggering weight of the historical evidence indicating that the Framers and ratifiers intended the Article V process to be constrained by constituent instructions. The Constitution is ostensibly a set of rules that "We the People" adopted over the course of more than 210 years, implicitly accept today, and may amend tomorrow. But now we have been told that Article V permits no popular direction of the amendment process. For the Eighth Circuit to make this claim is somewhat remarkable; for it to do so without historical support is deeply irresponsible. What is at stake is not merely one small provision of the Constitution, but the premise of the entire Constitution – the premise that the people may have some say in what it contains. Unfortunately, if the decision of the Eighth Circuit is allowed to stand, our Constitution will be one from which "We the People" have been politely dismissed.

Respectfully Submitted,

KRIS W. KOBACH*
Associate Professor
School of Law
Univ. of Missouri – Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110-2499
(816) 235-2390

*Counsel of Record

---

true interests of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial consideration." *The Federalist No. 10*, at 46-47 (James Madison) (Garry Wills ed., 1982).

Supreme Court, U.S.
FILED
AUG 11 2000
OFFICE OF THE CLERK

No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,
Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND LEAGUE OF WOMEN VOTERS OF MISSOURI IN SUPPORT OF RESPONDENTS

LOUIS R. COHEN
Counsel of Record
JONATHAN J. FRANKEL
ANNE HARKAVY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae
League of Women Voters of the United States and
League of Women Voters of Missouri

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE MISSOURI PROVISION IS AN UNCONSTITUTIONAL USE OF STATE POWER TO AFFECT THE OUTCOMES OF ELECTIONS TO CONGRESS. 4

A. A State's Authority To Prescribe the "Times, Places and Manner" of Federal Elections May Not Be Used To Favor Some Candidates or Policy Positions Over Others. 5

B. The Missouri Provision Is an Attempt To Use the State-Controlled Mechanics of Federal Elections in a Nonneutral Manner To Bring About the Election of Members of Congress Who Favor a Specific State Policy. 9

II. HISTORY DOES NOT SUPPORT THE CONSTITUTIONALITY OF THE MISSOURI PROVISION. 16

A. Petitioner's and Her *Amici*'s Historical Examples Do Not Speak to the Constitutionality of the Missouri Provision Because None Involved Placing a Message Setting Forth State Policy on a Federal Election Ballot. 16

TABLE OF CONTENTS — Continued

Page

B. Petitioner and Her *Amici* Ignore the Consistent Opposition to Instructing Representatives and Misconstrue the Framers' Rejection of a Constitutional Right To Instruct 22

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998) 11
AFL-CIO v. March Fong Eu, 686 P.2d 609 (Cal. 1984) 17
Anderson v. Celebrezze, 460 U.S. 780 (1983) 8, 10
Anderson v. Martin, 375 U.S. 399 (1964) 9, 14
Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D.S.D. 1998) 11
Burdick v. Takushi, 504 U.S. 428 (1992) 7, 10
Burson v. Freeman, 504 U.S. 191 (1992) 7, 14
California Democratic Party v. Jones, 120 S. Ct. 2402 (2000) 5, 7
City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 5, 15
Clements v. Fashing, 457 U.S. 957 (1982) 8
Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996) 10
FERC v. Mississippi, 456 U.S. 742 (1982) 19
Foster v. Love, 522 U.S. 67 (1997) 6
Georges v. Carney, 691 F.2d 297 (7th Cir. 1982) 14
Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999) 11
Graves v. McElderry, 946 F. Supp. 1569 (W.D. Okla. 1996) 14
Hunter v. Erickson, 393 U.S. 385 (1969) 5, 15
In re Opinion of the Justices, 148 So. 107 (Ala. 1933) 20
League of Women Voters v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997) 2, 11
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 5, 15
Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) 11
Powell v. McCormack, 395 U.S. 486 (1969) 8
Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) 14
Smiley v. Holm, 285 U.S. 355 (1932) 6

TABLE OF AUTHORITIES — Continued

Page

State ex rel. Harper v. Waltermire, 691 P.2d 826 (Mont. 1984) 17
State ex rel. McCue v. Blaisdell, 118 N.W. 141 (N.D. 1908) 21
Tashjian v. Republican Party, 479 U.S. 208 (1986) 8, 15
Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996) 2
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 14
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) ..... *passim*
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 4, cl. 1 ..... 1, 2, 4, 5

STATUTORY PROVISIONS

Idaho Session Law, House Bill No. 16, § 41 (1909) 21
Mo. Const. art. VIII, §§ 15-22 ..... 2, 10, 12
Mo. Rev. Stat. § 115.637(18) 14
1909 Neb. Laws ch. 51, § 2 21

BOOKS, ARTICLES, AND TREATISES

Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) 24, 26, 28
Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm & Mary L. Rev. 1037 (2000) 26
Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (1993) 28

TABLE OF AUTHORITIES — Continued

Page

The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins (Neil H. Cogan ed., 1997) ... 22, 27
Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (1989) 26
Debates on the Federal Constitution (Jonathan Elliot ed., 2d ed., 1836) (1941) 8, 19
George H. Haynes, *The Senate of the United States: Its History and Practice* (1938) 20, 21, 29
David Hess, *Gingrich Pledges To Fight Term Limits of Less Than 12 Years*, Phila. Inquirer, Jan. 12, 1995, at A9 12
Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (1930) 23, 26, 29, 30
Matthew Vita, *Political Appeal of Term Limits Appears to Wane*, Wash. Post, July 17, 2000, at A1 12
Noah Webster, *Government. The Practice of Instructing Representatives Absurd and Contrary to the True Principles of Liberty*, 1 American Magazine 206 (1787-88) 24, 25
Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969) 18, 22, 24, 25

OTHER AUTHORITIES

Annals of Congress (Joseph E. Gale ed., 1789) ..... *passim*
Annals of Congress (1817) 30
Articles of Confederation, art. V 19
The Federalist No. 10 23
The Federalist No. 71 23
Official Manual, State of Missouri 1997-1998 (Jim Grebing ed.) 11

BRIEF OF *AMICI CURIAE*

Amici respectfully submit this brief to make two points. First, the power of the States to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, does not include the power to disfavor a particular candidate for federal office by placing a notation on the ballot criticizing the candidate for failure to endorse or obey the State's substantive views on a federal issue. Second, the history of constituent instructions in this country provides no support for the constitutionality of such substantive intrusion by States into federal elections.

INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in more than one thousand communities and in every state, with more than 125,000 members and supporters nationwide. One of its independent state Leagues is *amicus curiae* League of Women Voters of Missouri. The League of Women Voters of the United States and the League of Women Voters of Missouri (jointly, the "League") were organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive; that protects individual liberties established by the Constitution; and that assures opportunities for citizen participation in government decisionmaking. To further this goal, the League has participated as a party or *amicus* in this

---

[1] This brief was authored in its entirety by undersigned counsel for *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

Court and other courts, addressing campaign finance, term limits, and other issues relating to the electoral process.

The League has a strong interest in this case. The League opposes term limits because they violate the most fundamental of all rights in a democracy — the right of citizens to vote for the governmental representatives of their choice. The Missouri constitutional provision at issue here, however, not only infringes on this right, but also is at war with the core values that the League has protected and promoted for the last eighty years. If upheld, the law would corrupt the electoral process itself. It would allow the State to use its power under the Elections Clause to manipulate the machinery of congressional elections to inject its own views on substantive federal issues into the electoral process at the most critical moment and in the most crucial space — on the ballot.

Amici submit this brief to explain the threat that Missouri's unconstitutional action presents to the integrity of the federal electoral process.[2]

SUMMARY OF ARGUMENT

The Constitution assigns responsibility for conducting the elections of United States Senators and Representatives to the States, and it directs them to prescribe the "Times, Places and Manner" of these elections through neutral, even-handed regulations. U.S. Const. art. I, § 4, cl. 1. Invoking this authority, the State of Missouri has adopted a ballot-branding mechanism, Mo. Const. art. VIII, §§ 15-22 (hereinafter, "Missouri Provision" or "Provision"), that is anything but neutral. Under the Missouri Provision, a partisan official of

[2] One of the state Leagues has successfully challenged a nearly identical law in another state. *See League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997). Moreover, the Arkansas League was a winning party in the leading term limits case, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); the League of Women Voters of Washington was a victorious party in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996), one of the predecessors to *Thornton*; and the LWVUS filed an amicus brief in *Thornton*.

the State audits candidates for United States Congress for their obedience (or pledged obedience) to the State's official policy on federal term limits, then labels candidates who have not supported the State's policy on the ballot as having "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *Id.* §§ 17, 18. Although these ballot labels are framed as if they are conveying the current sentiments of the electorate, the Missouri Provision in fact tests candidates against a particular term limits policy enshrined in state law back in 1996, and it makes no effort to ascertain or accurately reflect the current wishes of a federal candidate's constituents. Candidates are given no opportunity on the ballot to respond to or explain these highly misleading labels; indeed, under Missouri law, they are not even permitted within twenty-five feet of the polling place.

The Constitution does not permit the State of Missouri to abandon its impartiality and participate in congressional elections as an interested advocate. A State's delegated authority to regulate the "Times, Places and Manner" of such elections — a phrase that has always referred to substantively neutral *procedural* regulations — does not include the power to manipulate the electoral mechanism so as to encourage the national government representatives elected from that State to embrace the State's view of proper federal policy. Missouri's suggestion that the Provision is merely a voter education mechanism is belied by the fact that the Provision does not even attempt to convey an accurate message about the candidates' adherence to the current sentiments of their constituents, let alone do so in fact.

Petitioner and her *amici* argue that the Missouri Provision is constitutional because it is merely a modern-day version of the historical practice of constituent instructions to legislators. This argument fails both because the Missouri Provision differs in significant respects from the historical examples Petitioner and her *amici* cite, and because the history of instructions shows that the practice has always been

sharply criticized, including, for example, by the Framers, who rejected placing a right to instruct in the First Amendment. Because none of the historical examples involved federal elections, they have no bearing on the meaning of the Elections Clause. In addition, most of the historical examples relied solely on the informal expectation that officeholders would follow constituent sentiment; the Missouri Provision, by contrast, involves direct state intrusion into the relationship the Constitution creates and protects between federal representatives and their constituents.

ARGUMENT

I. THE MISSOURI PROVISION IS AN UNCONSTITUTIONAL USE OF STATE POWER TO AFFECT THE OUTCOMES OF ELECTIONS TO CONGRESS.

The Constitution's Elections Clause assigns the States the responsibility of establishing the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. The State of Missouri claims no other constitutional source of power to impose ballot labels on candidates for Congress, (Pet. Br. 28, 38), and there can be no other. But the Elections Clause grants the power to establish neutral procedural regulations for federal elections, not the power to audit the candidates and place substantive (and, in this instance, highly misleading) comments on the ballot about their adherence to official state policies on matters of federal law.

Under the Missouri Provision, the State ceases to be a neutral referee of federal elections and becomes an advocate for those candidates who favor the State's official view of proper federal policy in a particular area (in this instance, constitutional limits on terms of service in Congress). A partisan state official audits candidates' public statements and voting records, then places on the ballot itself an expression of the State's disagreement with any candidate who has not supported the position adopted by the State in 1996 on that

issue. While the ballot labels Missouri imposes suggest that the branded candidates are ignoring the wishes of the "VOTERS," the Missouri Provision has little or nothing to do with the actual current sentiments of a candidate's constituents. Missouri is testing candidates against a State policy established in 1996 and branding those who have not supported the State's position. The Constitution does not permit the States to police candidates for the United States Congress in this fashion.[3]

A. A State's Authority To Prescribe the "Times, Places and Manner" of Federal Elections May Not Be Used To Favor Some Candidates or Policy Positions Over Others.

The Elections Clause, U.S. Const. art. I, § 4, cl. 1, directs state legislatures to adopt "Regulations" prescribing the "Times, Places and Manner" of elections to Congress. This power is subject (with an irrelevant exception) to the power of Congress to "make or alter such Regulations." *Id.* This Court has made clear that the only powers States have with respect to elections of Members of Congress are those delegated by this Clause, *see U.S. Term Limits, Inc. v. Thornton*,

---

[3] The Missouri Provision was adopted by popular referendum rather than by the State Legislature. This makes no constitutional difference: the issue is whether a State can establish — by whatever method of passing legislation — an official viewpoint with respect to some federal issue, then use the electoral mechanism to brand candidates for Congress who do not support and obey the State's favored position. On this point, an action taken by referendum is no more valid than the same action if taken by the State Legislature. *See City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

Action by referendum does, however, pose a technical problem in this instance. The Elections Clause says regulations may be adopted by "each State *by the Legislature thereof*." U.S. Const. art. I, § 4, cl. 1 (emphasis added). It is unclear whether States may adopt regulations governing federal elections by means other than actions of their legislatures. *See California Democratic Party v. Jones*, 120 S. Ct. 2402, 2422-23 (2000) (Stevens, J., dissenting).

514 U.S. 779, 804-05 (1995), and Missouri claims no other constitutional source of power here.[4]

This Court has made clear that the States' power under the Elections Clause is to prescribe neutral regulations governing the "mechanics" of federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997). The Clause is not a license to the States to use the mechanics of federal elections to promote or oppose federal policies favored or disfavored by the State.

First, the very terms "Times, Places and Manner" suggest that the Framers expected the States to carry out elections to federal office as impartial rule makers and neutral referees, not as partisans with their own interest in the outcome. The Court has itself always used those words to refer to substantive neutrality; indeed, it borrowed the phrase to describe content-neutral regulation of speech.[5] As the Court has said, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes [or] to favor or disfavor a class of candidates." *Thornton*, 514 U.S. at 833-34. *See also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (Elections Clause grants States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental [voting] right involved.").

In addition, the role given to *Congress* under the Elections Clause strongly reinforces the conclusion that "Times, Places and Manner" regulations must be substantively neu-

---

[4] The State's claimed power could not be "reserved" to the States by the Tenth Amendment: the power to regulate elections to Congress did not exist until the Federal Government was created by the Constitution. The Constitution delegated regulatory power over congressional elections *to* the States, subject to the power of Congress to "make or alter" state regulations. *See Thornton*, 514 U.S. at 804.

[5] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (describing "time, place, or manner" regulation of expressive activity as "justified without reference to the content of the regulated speech") (internal quotation marks and citation omitted).

tral. The words "Times, Places and Manner" must mean the same thing as to both Congress and the States. If Congress could use its power to "make . . . such Regulations" to inject substantive matters into the election machinery, then instead of following the policies that voters want on term limits (or gun control, or farm subsidies, or any other issue), Congress could manipulate congressional elections to produce future representatives who favor a given position on these issues; by analogy to what Missouri has done here, it could simply adopt a "Regulation" branding the candidates opposed to that position on the ballot. Even if it were possible to imagine the Framers giving the States the power to inject their substantive positions into congressional elections, it is inconceivable that they meant to allow Congress itself to do so. *See Thornton*, 514 U.S. at 832 (finding it "unfathomable" that the Framers would have permitted Congress to set its own qualifications, as that "would inevitably lead to congressional self-aggrandizement"); *California Democratic Party*, 120 S. Ct. at 2416 (Kennedy, J., concurring) ("In a free society the State is directed by political doctrine, not the other way around.").

More generally, in principle, the obligation to conduct an election in a democracy inherently includes the obligation to conduct it impartially. The Court has made clear in numerous contexts — state and federal races, general elections and primaries — that all State regulation of the electoral process must be "nondiscriminatory," "generally applicable," and "evenhanded," *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983), as well as "politically neutral." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). The State's role in an election is to "protect the integrity and reliability of the electoral process," not to skew it, and to "protect[] voters from . . . undue influence," not to persuade them. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion). The State may not jigger the electoral process to "produc[e] elected officials who," in its view, "better represent the electorate" or "stand closer to the median policy positions of their districts," *see California Democratic Party v. Jones*, 120 S. Ct. at 2412,

and it seems equally clear that the State cannot jigger the process to produce officials who better represent the State's own views. *See Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986) (invalidating closed primary statute designed to "ensur[e] that voters are not misled by a 'Republican' candidate who professes something other than what the State regards as true Republican principles"). "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a certain viewpoint," or that "unfairly or unnecessarily burdens 'the availability of political opportunity'" for proponents of the singled-out position. *Anderson v. Celebrezze*, 460 U.S. at 793 (citations omitted). *See also Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality opinion) (upholding resign-to-run rules that "in no way depend upon political affiliation or political viewpoint"); *id.* at 973 (Stevens, J., concurring) (regulations must be "even-handed"; upholding rule where "there is no suggestion . . . that the State's classification . . . operates to promote a certain viewpoint at the expense of another").[6]

Finally, the State's obligation of strict neutrality in elections to Congress reflects the "fundamental principle" that "'the people should choose whom they please to govern them'" in the Congress of the United States. *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (Jonathan Elliot ed., 2d ed., 1836 (1941) (hereinafter "Elliot's Debates") (Alexander Hamilton)). "The people are the best judges of who ought to represent them" in the national government, and "'to tell them whom they shall not elect, is to abridge their natural rights.'" *Id.* at 541 (quoting 2 Elliot's Debates 292-93

---

[6] The dissenters in *Thornton*, although they argued that States may prescribe additional qualifications for Members of Congress, clearly rejected any idea "that States have unbridled power to handicap particular classes of candidates" and agreed that any new qualifications added would be subject to scrutiny under the First and Fourteenth Amendments. *Thornton*, 514 U.S. at 925 (Thomas, J., dissenting); *see also id.* at 870.

(Robert Livingston)). The Court has recently affirmed "that the right to choose representatives belongs not to the States, but to the people," *Thornton*, 514 U.S. at 820-21, and state efforts to disfavor candidates for Congress who disagree with, or fail to obey, state policy would threaten to "sever the direct link that the Framers found so critical between the National Government and the people of the United States." *Id.* at 822. *See also id.* at 842 (Kennedy, J., concurring) ("Nothing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."). The State may not decide as a State that it prefers its residents' representatives in the United States Congress to hold a certain set of views, then enforce that preference by branding any disobedient candidate with a negative notation on the ballot the State makes available pursuant to the Elections Clause.

B. The Missouri Provision Is an Attempt To Use the State-Controlled Mechanics of Federal Elections in a Non-neutral Manner To Bring About the Election of Members of Congress Who Favor a Specific State Policy.

Contrary to the Petitioner's argument in this Court, the Missouri Provision is *not* a means of conveying voter sentiments to candidates for Congress, or of reporting candidates' views and actions to voters. The Missouri Provision brands candidates, on the ballot, for not following a state policy adopted back in 1996 and made a permanent part of the State's law. The application of the State's brand does not depend on the sentiments of any set of actual voters in any election after 1996. Far from providing any opportunity for real communication between candidates and voters, the Missouri Provision is a blunt instrument applied "at the most crucial stage in the electoral process — the instant before the vote is cast," *Anderson v. Martin*, 375 U.S. 399, 402 (1964), to punish any candidate who does not pledge to follow, and

then actually follow, the State's policy in every detail. The State of Missouri has simply decided *as a State* that it would prefer its residents' representatives in Congress to hold certain views and act in a certain way, and has used its delegated authority over the conduct of federal elections to punish candidates who do not obey.

With the Missouri Provision, the State has stepped out of its constitutional role as neutral election referee and has become a partisan in each congressional election. It has adopted a statute setting forth a determination that it wants every person elected to Congress from Missouri to support and advance a very specific amendment to the United States Constitution, and it has prescribed the particular legislative actions such persons must take, as a matter of state law, in every parliamentary situation the State could think of. The State has further announced that it will enforce these directives through the electoral process itself: an official of the State (herself chosen in a partisan election) will audit candidates' fidelity to the State's policy and instructions, and if that official finds that a candidate has *not* complied (or pledged to comply) with the State's instructions, a message from the State of Missouri will appear next to the candidate's name on the official election ballot, accusing her of "DISREGARD[ING]" her constituents' preferences or "DECLIN[ING] TO PLEDGE" to carry out their wishes. Mo. Const. art. VIII, §§ 17, 18.

The Missouri Provision is, to say the least, not "even-handed," *Anderson v. Celebrezze*, 460 U.S. at 788 n.9, or "politically neutral." *Burdick v. Takushi*, 504 U.S. at 438. As virtually every court to consider one of these ballot branding laws has ruled, the brand is nothing less than "an officially sanctioned recommendation by the State . . . not to vote for such candidates because they disregarded the instructions and wishes of their voters." *Donovan v. Priest*, 931 S.W.2d

119, 128 (Ark. 1996).[7] The State responds by suggesting that its label may not actually convince any voters to change their votes (*see* Pet. Br. at 21), but this misses the point: regardless of the practical impact of the State of Missouri's official message, it is clear that the State is violating its duty to conduct federal elections impartially and is entering these campaigns as an advocate with an obvious point of view.

The State argues that the Provision is an effort by "the people[]" of Missouri "to inform each other regarding their congressional delegation's compliance" with their wishes. (Pet. Br. 7.) But the only "people of Missouri" who took any action at all were the 32% of the electorate who, in 1996, voted in favor of the Provision.[8] The label "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS," applied in 2000 (or 2020) to every disobedient Member of Congress, will commonly be very misleading and often entirely false:

Constituents. In 1996, a majority of the voters in a particular congressional district may *not* have voted in favor of the Provision. (As Petitioner acknowledges, voters in 28 Missouri counties did *not* favor the Provision. (*See* Pet. Br. 21.)) A candidate for Congress who fails to obey Missouri's

---

[7] *See also Gralike v. Cook*, 191 F.3d 911, 918-19 (8th Cir. 1999) ("Thus, the labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that § 17 requires."); *Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999) ("[the] ballot labels effectively place the state's official stamp of disapproval on . . . candidates . . . whom the state disfavors because of their views on a single political issue"); *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 61 (D. Me. 1997); *Advisory Op. to the Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 n.3 (Fla. 1998) (label is "obviously intended to be, and would be, a negative comment on the candidate at issue").

[8] The Missouri Provision received 1,075,215 votes in its favor in the November 1996 election. There were 3,342,849 registered voters in Missouri at that time. *See Official Manual, State of Missouri, 1997-1998*, at 547, 591 (Jim Grebing ed.).

term limits instructions therefore may be following the wishes of a majority of the voters in her district. But the ballot will *not* say she OBEYED THE WISHES OF VOTERS IN HER DISTRICT. The Secretary of State will brand her as having "DISREGARDED VOTERS' INSTRUCTIONS," and she will have no equivalent opportunity to respond that she is in fact doing what her own constituents favored.

Passage of time. The Missouri Provision became part of Missouri law in 1996. It will continue to brand disobedient candidates in subsequent elections forever, until the precise term limits proposal called for becomes part of the United States Constitution. But there is no reason to assume that voter sentiments will remain unchanged. *See, e.g.*, Matthew Vita, *Political Appeal of Term Limits Appears to Wane*, Wash. Post, July 17, 2000, at A1. Even the State concedes that "[t]he voters in subsequent years may have a different view." (Pet. Br. 21.) This mismatch, too, illustrates that the Missouri Provision is not intended to convey any accurate message to voters as to where candidates stand, but rather to skew elections against candidates who do not follow the State's policy on a federal term limits amendment.

Alternative term limits proposals. The Missouri Provision directs Members of Congress to vote for a specific term limits proposal and *against* all competing proposals, including proposals that would allow longer, but still limited, terms. Mo. Const. art. VIII, § 17. It is the product of a struggle within the term limits movement over shorter versus longer terms, each anathema to supporters of the other.[9] But

[9] At the time the Missouri Provision was adopted, there was an active debate within the term limits movement as to the appropriate limits for incumbents to serve. Many proponents of term limits did (and still do) support longer limits than those contained in the Missouri Provision. *See, e.g.*, David Hess, *Gingrich Pledges To Fight Term Limits of Less Than 12 Years*, Phila. Inquirer, Jan. 12, 1995, at A9; Matthew Vita, *Political Appeal of Term Limits Appears to Wane*, Wash. Post, July 17, 2000, at A5 (chart showing the different term limits proposals that have been adopted in the various states).

there is no reason to assume that all Missouri VOTERS who favored the particular proposal set forth in the 1996 referendum would have opposed, and wanted their Member of Congress to vote against, competing term limits proposals: the referendum did not give VOTERS alternative choices. Nevertheless, a Member who fails to vote against a measure that Missouri voters might well in fact have favored is also branded as having "DISREGARDED VOTERS' INSTRUCTIONS."[10]

Term limits measures attached to larger bills. A Member of Congress may vote against a bill that contains the Missouri-prescribed term limits measure but also contains other provisions that the Member's constituents oppose. She will be branded as having "DISREGARDED VOTERS' INSTRUCTIONS" with no opportunity to rebut the ballot label with an explanation of the offsetting considerations.

In sum, when the Missouri Secretary of State tells a candidate's constituents that the candidate has "DISREGARDED VOTERS' INSTRUCTIONS," the VOTERS in question are not the voters in her own district; they may have changed their minds in the lengthening years since 1996; they may have equally favored a different term limits measure that the candidate got branded for not rejecting; and they might in fact agree with the candidate in rejecting a term limits measure coupled with unacceptable other provisions. But the point is not merely that the ballot brand is highly misleading. The Missouri Provision is simply not a serious effort to convey current voter sentiments to candidates, or to disclose candidate performance to voters. It is an attempt to impose a policy adopted by the State in 1996 by using the State's control over the contents of the ballot to skew elections against candidates who do not follow that policy to the letter.

[10] Similarly, a candidate who declares her support for a competing term limits proposal will still be branded as having "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

It is particularly offensive that the State has chosen to impose its 1996 policy choice by placing its message in the most sacred of secular places: on the ballot. As this Court recognized in *Anderson v. Martin*, 375 U.S. 399 (1964), messages from the State on the official election ballot carry a disproportionate weight precisely because they bring the apparent "power of the State" to bear at "the most crucial stage in the electoral process — the instant before the vote is cast." *Id.* at 402. By branding candidates on the ballots used to elect them, the State of Missouri "direct[s] the citizen's attention to the single consideration of" a candidate's position on the State's favored issue, and signals that the candidate's position should be "an important — perhaps paramount — consideration in the citizen's choice." *Id.*[11]

The Court has also held that the moment when the voter casts his ballot is sufficiently sensitive that it may be "necessary" for a State to ban all electioneering around the polling place to protect the voter from "undue influence." *Burson v. Freeman*, 504 U.S. at 199, 206. For this very reason, in fact, the State of Missouri has made it unlawful to conduct any campaign activities in a polling place or within twenty-five feet of the outside door. *See* Mo. Rev. Stat. § 115.637(18).[12]

---

[11] For this reason, several federal courts have ruled that government entities may not manipulate the content of ballots (or even the arrangement of information on a ballot) to favor one candidate or position over another. *See, e.g., Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) (invalidating statute that permitted party candidates to use party labels on the ballot, but barred non-party candidates from labeling themselves "Independents"); *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (upholding statute that neutrally prevented any advisory referenda from appearing on ballot; "case would be different" if government entity could get its own referenda on the ballot, particularly if entity "was taking sides" on matters of public debate); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996) (invalidating State's practice of always placing Democratic candidates at top of ballot).

[12] Moreover, even if the State of Missouri did permit candidates to speak at polling places, they would still have no right of access to the ballot itself in order to answer or explain the State's disparaging brand. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

A particular irony of this case is that, while the State of Missouri has deemed the moment of voting so sacrosanct (and the risk of undue influence so great) that the *candidate* cannot be within twenty-five feet of the building, the *State* may approach the voter *in the voting booth itself* and tell her how to cast her vote.

Finally, the fact that the Missouri Provision was itself adopted by public referendum does not render it constitutional. (*Cf.* Pet. Br. 6-7.) A State cannot do by referendum what it could not do through its legislature. "The sovereignty of the people itself is subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). *See also City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964). And the method by which the Provision became a part of state law does not alter its legal force or its requirement that elected State officials audit candidates in federal elections and pronounce judgment on them to the voters in the name of the State itself.[13] *See Thornton*, 514 U.S. at 822 n.32 (invalidating term limits amendment to Arkansas Constitution adopted by referendum and holding method of adoption to be irrelevant). The State cannot step out of its constitutional role as the impartial arbiter of federal elections,

---

[13] It is this aspect of auditing and pronouncing judgment on candidates, as well as the intended normative content of the labels, that distinguishes the Missouri Provision's brand from the political party labels cited by the Petitioner and the incumbency labels cited by her *amici*. (*See* Pet. Br. 21-22; Mo. Term Limits Br. 24-28.) Petitioner is correct that party labels may be taken by voters as revealing something substantive about a candidate, but the candidate herself determines with which political party she will affiliate, and (as this Court has held) the State may not audit her campaign platform to make sure that she in fact stands for the principles that the State believes a candidate with that party label should uphold. *See Tashjian v. Republican Party*, 479 U.S. at 220. Similarly, incumbency labels carry no intentional message from the State (let alone a message about the State's favored view on any particular policy issue), and they are applied neutrally.

whether the drive for abandoning neutrality comes from the legislature or a public referendum.

II. HISTORY DOES NOT SUPPORT THE CONSTITUTIONALITY OF THE MISSOURI PROVISION.

Petitioner and her *amici* seek to defend the constitutionality of the Missouri Provision with historical examples of instructions issued to officeholders. The defense fails for two reasons. *First*, all of the examples differ in critical respects from the Missouri Provision. None of these examples involved federal elections or the State's powers under the Elections Clause. None involved a state brand on the ballot designed to discourage voting for candidates for federal office who disobey a state policy. Most were simply expressions of voter views backed only by the threat that voters would turn away from a candidate who disagreed. *Second*, Petitioner's and her *amici*'s portrait of the practice of instructions is very misleading. Instructions were never a generally accepted political practice. On the contrary, the Framers expressly rejected adding a "right to instruct" national representatives to the First Amendment. Having observed the adverse consequences of binding instructions under the Articles of Confederation and in pre-1789 state legislatures, the Framers sought to avoid the strangling of legislative deliberation and the predominance of local over general interests that they believed instructions breed.

A. Petitioner's and Her *Amici*'s Historical Examples Do Not Speak to the Constitutionality of the Missouri Provision Because None Involved Placing a Message Setting Forth State Policy on a Federal Election Ballot.

The historical examples proffered by Petitioner and her *amici* lack the features that render the Missouri Provision unconstitutional. None of the historical examples involved a State placing a brand on a federal election ballot as a means to influence the election of federal legislators who favor a

particular state policy. In fact, none of the examples involved federal elections conducted pursuant to the Elections Clause at all.

Petitioner says that "[f]rom the earliest days of our country, the people have exercised their right to influence the form of their government." (Pet. Br. 11.) But that unobjectionable statement is wholly unenlightening as to the constitutionality of the Missouri Provision. Of course citizens may communicate their views to their representatives and vote against those who disagree. It does not follow that *States* may require Members of Congress to follow state policies in their legislative activities and then take formal action penalizing those who do not. *Cf. AFL-CIO v. March Fong Eu*, 686 P.2d 609 (Cal. 1984) (finding unconstitutional a state initiative that required state legislators to petition for a constitutional convention on pain of losing their pay); *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984) (finding unconstitutional an initiative that would have required state legislators to petition Congress for a balanced budget amendment under threat of confinement in session and no pay).

The question in this case is whether a State may use its Elections Clause power over the ballot to brand candidates for federal office for disagreeing with the State's official policy on matters of federal law. Petitioner's and her *amici*'s examples do not help to answer this question. None of the examples, from any time period, involved instructions given, received, or interpreted in conjunction with a federal election. Accordingly, they do not implicate the State's power under the Elections Clause. Most of the pre-twentieth century examples of instruction do not centrally involve state enforcement at all. The twentieth century examples, some of which do involve state-sponsored pledges and ballot notations in elections, deal only with state elections, not the Elections Clause, nor the relationship between Members of Congress and their constituents.

Pre-twentieth century examples. None of the pre-twentieth century examples of constituent instructions involved any form of government enforcement.[14] Representatives who flouted the wishes of their constituents had only the wrath of the voters to fear. As Petitioner concedes, any coercive effect of such instructions was a product of the political culture of the time; representatives who disagreed with constituent instructions generally felt compelled either to obey anyway or to resign. (*See* Pet. Br. 14 n.13); *see also* Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 191 (1969). Kobach also concedes that "no formal legal mechanism compelled the representative to obey his instructions" in the colonial era. (Kobach Br. 5.)

But the constitutional question is whether the State can use its powers to conduct federal elections to inject its own view into the voters' choice of Members of Congress. The answer is no: "It was the genius of [the Framers'] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" and that each layer of government would have "its own direct relationship, its own privity, its own set of mutual rights and obligation to the people who sustain it and are governed by it." *Thornton*, 514 U.S. at 838-39 (Kennedy, J., concurring). When citizens vote for their federal legislators, "they act in a federal capacity and exercise a federal right," protected from State interference. *Id.* at 842 (Kennedy, J., concurring). The Missouri Provision interferes with the "direct link" that the

[14] *See* Pet. Br. 11-14 (recounting instructions issued to delegates to the Second Continental Congress who crafted the Declaration of Independence; to the Framers of the Constitution; and to Members of the First Congress regarding the Bill of Rights); Kobach Br. 4-19 (discussing instructions to delegates to the First and Second Continental Congresses; to state delegates who were framing state constitutions; to States' delegates to the Congress of the Articles of Confederation; to delegates to the Constitutional Convention; to delegates to state ratifying conventions; and to Members of Congress from state ratifying conventions in order to secure the Bill of Rights).

Constitution created between the people and their national representatives by forcing citizens to view the candidate, at the very moment of voting, through a State-imposed lens. *Id.* at 803 (citing *FERC v. Mississippi*, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part)).

Petitioner's and her *amici*'s heavy reliance on *pre*-Constitutional examples of constituent instructions also ignores the establishment of a "National Government [in which] representatives owe primary allegiance not to the people of a State, but to the people of the Nation." *Thornton*, 514 U.S. at 803. Making national representatives accountable to the State was perhaps not inconsistent with the Articles of Confederation, where national legislators were charged with representing "'the *States*, not the *people* of the States,'" *FERC v. Mississippi*, 456 U.S. at 791 (O'Connor, J., concurring in the judgment in part and dissenting in part) (quoting 1 *The Records of the Federal Convention of 1787*, at 133 (M. Farrand ed. 1911)), and the State retained the right to "recall its delegates . . . at any time" and "send others in their stead," Art. of Conf., art. V. But the Framers rejected this system in adopting the Constitution. They jettisoned State recall power over federal legislators precisely because they intended federal elections themselves to be the means for holding federal representatives accountable to their constituents. *See Thornton*, 514 U.S. at 810 n.20; *id* at 889-90 (Thomas, J., dissenting); *see also* 2 Elliot's Debates 320 (Alexander Hamilton) ("Is [a Senator] simply the agent of the State? No. He is an agent for the Union and he is bound to perform services necessary to the good of the whole. . . .").

Twentieth century examples. The twentieth century examples of measures attempting to bind legislators are no more persuasive.[15] Around the turn of the last century, sup-

[15] *See* Pet. Br. 14-17 (discussing pledges taken by state legislators to spur passage of the Seventeenth and Twenty-First Amendments); Kobach Br. 17-19 (discussing instructions to delegates to state conventions re-

porters of the direct election of United States Senators successfully pressed several states to alter the elections process for *state* legislators in order to ensure the election of state legislators who would, in turn, choose Senators who favored adoption of what became the Seventeenth Amendment. *See* 1 George H. Haynes, *The Senate of the United States: Its History and Practice* 100-04 (1938) (describing the systems in Oregon, Nebraska, and North Dakota). Oregon, for example, conducted non-binding popular elections in which voters could express their preference for United States Senator, and permitted candidates for state legislative office to adopt a pledge (or not) either to vote for the people's choice for Senator or to "consider" the people's choice; these candidates could also compose a one hundred word statement to file with their nominating petitions and a twelve word statement to appear next to their names on the ballot. *See id.* at 100-01. Nebraska added a step by providing for a ballot notation for candidates who chose either of the two pledges and no notation for candidates who chose not to adopt a pledge at all. *See id.* at 103. Other states, including Idaho and North Dakota, also adopted similar provisions.

Although these early twentieth century measures involved States printing ballot notations (or other election-related statements), any similarity to the Missouri Provision ends there. Most notably, none of these measures provided for State involvement in federal elections, and thus none raised any question under the Elections Clause.[16] But other

garding adoption of the Twenty-First Amendment); Mo. Term Limits Br. 14-21 (discussing pledges and ballot notations for state legislators designed to spur passage of the Seventeenth Amendment and instructions and pledges for delegates to state conventions considering ratification of the Twenty-First Amendment); Neb. Br. 15-20 (same).

[16] The measures States adopted to press for repeal of the Eighteenth Amendment and ratification of the Twenty-First Amendment also did not apply to elections for federal office. The measure that the Alabama Supreme Court determined was constitutional in *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933), for example, required candidates for delegate to a *state* convention to pledge to follow the popular sentiment expressed in a referendum on the repeal of Prohibition. This provision involved purely internal state processes and did not intrude into the relationship between the federal representative and his constituents.

distinctions abound. Under Nebraska's early twentieth century measure, a candidate could avoid a ballot notation altogether by choosing not to adopt either pledge, while under the Missouri Provision a disobedient candidate cannot escape the State's punishment on the ballot.[17] *See* 1909 Neb. Laws, ch. 51, § 2, at 253. The Oregon provision did not include State-approved ballot language at all; the candidate himself crafted the twelve-word statement that could appear on the ballot. *See* 1 Haynes, *supra*, at 101. Contrary to Petitioner's assertion that Oregon "required" candidates to sign one of the two offered pledges, neither Nebraska nor Oregon made mandatory the adoption of a pledge on the nominating petition. *See id.* at 101-03. In fact, when North Dakota did require candidates to pledge to vote for the people's choice for Senator, the North Dakota Supreme Court struck down that portion of the law as unconstitutional. *See State ex rel. McCue v. Blaisdell*, 118 N.W. 141 (N.D. 1908). The real "teeth" to the Oregon system lay not in the law but in "effective popular agitation." 1 Haynes, *supra*, at 102. Like Odysseus binding himself to the mast to resist the song of the Sirens, the voters of Oregon circulated petitions among themselves, pledging not to sign a petition or vote for the nomination of any candidate who did not promise to vote for the people's choice for Senator.

Finally, the existence of these examples of course does not speak to their constitutionality. "One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States." *Thornton*, 514 U.S. at 823.

[17] Similarly, an Idaho law provided for pledge notation on the ballot only if the candidate promised to *support* the people's choice for Senator. *See* Idaho Session Law, House Bill No. 16, § 41 (1909). The law did not impose a mark of shame for choosing not to precommit (or not to reveal one's choice at all).

B. Petitioner and Her *Amici* Ignore the Consistent Opposition to Instructing Representatives and Misconstrue the Framers' Rejection of a Constitutional Right to Instruct.

Petitioner's and her *amici*'s tale of legislative instruction in America omits an important chapter: the longstanding, principled opposition to constituent instructions. Contrary to their portrayal of constituent instructions as an integral aspect of American representative government, the Framers consciously chose, after a "long debate" on the merits of the practice, not to include a right to instruct representatives in the First Amendment's catalog of political rights that they deemed essential to the operation of the new representative government. *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 162 (Neil H. Cogan ed., 1997).

Before the adoption of the Constitution, there was no consensus about the desirability of instructions, either to state or national legislators. In fact, when the Framers debated adding to the First Amendment a right to instruct representatives, Representative Hartley of Pennsylvania observed that Americans "differed exceedingly" about instruction. 1 *Annals of Cong.* 761 (Joseph E. Gales ed., 1789). Opponents of binding instructions often framed their opposition in terms of foundational principles of representation. They explained that although the people were the source of all political power, they could only exercise that power through the medium of periodic elections, not by continuously instructing their representatives. *See, e.g.*, Wood, *supra*, at 370-71 (describing Judge Alexander Hanson's argument against instructions to state legislators in Maryland in the late eighteenth century). In the post-Revolutionary War period, "Americans in almost all the states mounted increasing attacks on the tendencies of the American representational system, [including] excessive localism, [and] binding instructions . . . . The ideal of an independent and deliberative legislature, attending to the common interests of the whole state, would not die." *Id.* at 195-96.

Prominent political thinkers, including Alexander Hamilton, embraced this ideal. *See* The Federalist No. 71 ("When . . . the interests of the people are at variance with their inclinations, it is the duty of the person whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."). Our first President was among those who "stood for the independence of the representative" from binding instructions. Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 462 (1930). George Washington was not "'friendly to positive instructions from electors'" because he believed that representatives "'should be left to act according to the judgment [they] shall form, after being enlightened by the arguments and collected wisdom of a deliberative assembly.'" *Id.* (quoting 1 *Life of Washington, Writings of Washington*, 491). Contrary to the suggestion that "[James] Madison plainly regarded constituent instructions as an intrinsic part of Congress's operations," (Kobach Br. 9), Madison staunchly opposed instructions as incompatible with the essence of representation. He lauded representative government for its ability to:

> refine and enlarge the public views, by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

The Federalist No. 10.[18] Binding instructions undermine the function of the representative, as understood by Madison, by

---

[18] In the last footnote of his brief, Kobach attempts to co-opt this oft-quoted language of Madison to buttress the ballot-label law. First, Ko-

preventing him from "refin[ing] and enlarg[ing] the public views" because the citizens have issued inflexible edicts. Noah Webster summarized the problem of instructions succinctly: "They make the opinions of a small part of the state a rule for the whole — they imply a decision of a question, before it is heard — they reduce a Representative to a mere machine, by restraining the exercise of his reason — they subvert the very principles of republican government." Noah Webster, *Government. The Practice of Instructing Representatives Absurd and Contrary to the True Principles of Liberty* 1 American Magazine 206 (1787-88).

The Framers' and others' opposition to the practice of instruction stemmed not only from political theory, but also from first-hand observation of the "bad consequences" of the practice of binding instruction, which was followed in states under the Articles of Confederation. 1 *Annals of Cong.* at 761 (statement of Rep. Hartley). In their view, constituent instructions caused an unhealthy emphasis on local interests, to the exclusion of more general interests, because state legislators were treated as ambassadors of quasi-independent townships and counties. *See* Wood, *supra*, at 192-96. By 1788, as the state legislatures were passing a flurry of ill-considered laws, *see id.*; *id.* at 368-69, James Madison concluded that "a spirit of locality" permeated state politics such

---

bach misconstrues Madison's central meaning; this text is generally understood to be an anti-instruction screed. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1059 (1988) (citing Garry Wills, *Explaining America* 216-30 (1981)); Luce, *supra*, at 456. Second, the operation of the Missouri Provision is inconsistent with this description of representation. The Provision leaves no room for federal representatives to do anything with the "public view" that it encapsulates other than to follow it to the letter; any deviation is rewarded with a pejorative ballot notation. Interpretation is penalized, not encouraged. The Provision recorded a "voice" of the people on Election Day in 1996, and instead of allowing the representatives to listen to, understand, interpret, and then speak in that voice, as Madison exhorted, it permits them only to play the recording in the Capitol.

that state legislators were "'everywhere observed to lose sight of the aggregate interests of the Community, and even to sacrifice them to the interests or prejudices of their respective constituents.'"[19] *See* Wood, *supra*, at 195 (quoting Madison's Observations on Jefferson's Draft of a Constitution for Virginia (1788), Julian P. Boyd ed., 6 *The Papers of Thomas Jefferson* 308-09 (1950)). Through binding instructions, the people sapped the ability of state legislators to "refine" their views in light of information gleaned during legislative debate or to compromise in the interest of the public good. In short, the people seemed to be supplanting the legislative function of the state legislatures. *See* Wood, *supra*, at 368. Madison was clearly disturbed by this trend, believing that "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." *Id.* at 410. In fact, it was not only the inadequate federal structure of the Articles of Confederation, but — perhaps more importantly — the "popular despotism" of the 1780s, *id.* at 411, to which the practice of instruction was integral, that led to the call for a Constitutional Convention. *See id.* at 467 (citing Madison's recognition of this phenomenon).

It is thus no surprise that the Members of the First Congress rejected an attempt by Representative Thomas Tucker of South Carolina to include a "right to instruct" federal representatives alongside the rights of speech, press, assembly, and petition in the First Amendment. 1 *Annals of Cong.* at 761. Petitioner and her *amici* basically ignore the substance of the Representatives' arguments that instructions are incompatible with the principles of republican government en-

---

[19] Noah Webster observed that in the post-Independence period, "most of the destructive measures which have been pursued by the states [had] originated in towns and counties, and been carried out by positive instructions from constituents to Representatives." Noah Webster, *Government. The Practice of Instructing Representatives Absurd and Contrary to the True Principles of Liberty* 1 American Magazine 206 (1787-88).

shrined in the Constitution.[20] In fact, the rejection of the "right to instruct" was an acknowledgement that the practice of attempting to bind federal legislators through instructions was incompatible with the conceptions of representation and federalism that underlie the Constitution. *See* Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 25 (1989); Amar, *Philadelphia Revisited*, at 1059-60. The Framers and the Members of the First Congress recognized that the problems faced by the state legislatures in the 1780s would be more severe, both in degree and in kind, in a national legislature. Even John Adams, a staunch defender of the right of state citizens to instruct their *state* representatives, recognized that instruction from States to federal legislators was a different and dangerous idea. Adams wrote that he saw:

> 'no right in our [state] Senate and House to dictate, nor to advise, nor to request our Representatives in Congress. Congress must be 'the cloud by day and the pillar of fire by night' to conduct this nation, and if their eyes are to be diverted by wandring light, accidentally springing up in every direction, we shall never get through the wilderness.'

Luce, *supra*, at 454 (quoting John Adams to J.B. Varnum, Dec. 26, 1808, Works, IX, 605). *See also* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1090 (2000) (noting that the analysis of coercive measures applied to state legislators is "quite different with regard to federal legislators" because "Congress is not an agent of people of the states for any purpose" and "[t]he people of a state cannot displace Congress or preempt it").

---

[20] The Brief of the Respondents sets forth this debate in detail, which we will not repeat here.

The context in which the Framers repudiated Representative Tucker's proposal makes it clear that their decision was based on their opposition to instructions, rather than "an acknowledgement of the fact that such clause would be unnecessary," as Kobach asserts. (Kobach Br. 19.) Directly before debating the merits of the "right to instruct" proposal, the House took up a proposal to strike out reference to the right to "assemble" on the grounds that such a right was already logically encompassed by the right to speak. Cogan, *supra*, at 129-31, 143-44. The determination to *retain* the right to assemble refutes Kobach's conclusion that the "right to instruct" was rejected as redundant.

Opponents of the "right to instruct" generally cited two reasons for their opposition: (1) fear that such a right would lead to a predominance of local interests, contravening the national spirit of Congress and the "direct link" between constituents and their federal representatives and (2) concern about stifling legislative deliberation. Several who spoke against the "right to instruct" explained that instruction leads to parochial interests trumping communal interests. *See* 1 *Annals of Cong.* at 761 (statement of Rep. Hartley) ("[C]an it be supposed that the inhabitants of a single district in a State, are better informed with respect to the general interests of the Union, than a select body assembled from every part?"); *id.* at 764 (statement of Rep. Jackson) (fearing that instructions would "drive the house into a number of factions"); *id.* at 767 (statement of Rep. Madison) ("I do not believe the inhabitants of any district can speak the voice of the people; so far from it, their ideas may contradict the sense of the whole people."). Legislators acting under instructions are guided only by the narrower perspective of their electors, rather than the broader sense of the public good. But "Members of Congress are chosen by separate constituencies . . . they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government." *Thornton*,

514 U.S. at 837-38. That is, in essence, why Madison concluded that binding instructions are "of a doubtful, if not of a dangerous nature." 1 *Annals of Cong.* at 767.

Opponents of instruction also recognized that it deters — even renders unnecessary — legislative deliberation. This "displace[ment of] everyday deliberation in ordinary government entities . . . threatens to swallow up Madison's scheme of representative government." Amar, *Philadelphia Revisited* at 1059. The Framers understood that legislators who have no choice but to follow the dictates of their constituents can derive no benefit from the exchange of views and information that a legislative assembly provides. Several Representatives who disapproved of the addition of a "right to instruct" raised the specter of a national legislature that had no function but to tally predetermined votes. *See* 1 *Annals of Cong.* at 763 (statement of Rep. Clymer) (asserting that instruction "is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the legislatures of free governments"); *id.* at 763-64 (statement of Rep. Sherman) (arguing that instructions give people the false impression that they can "control the debates of the legislature," which would, in turn, "destroy the object of their meeting"); *id.* at 770 (statement of Rep. Livermore) (denying the binding force of instructions because "it might be expedient, nay absolutely necessary, to sacrifice [various measures] in mutual concessions" as part of the lawmaking process). Accordingly, the rejection of the "right to instruct" federal representatives was an affirmation that the Constitution values — indeed, demands — that federal representatives not be bound by instructions that will inevitably eviscerate the national spirit and deliberative character of our Congress.

Given the long and consistent history of strong opposition to the general practice of instructions, as well as the rejection of a constitutional right to instruct by the First Congress, it is not surprising that the practice died out in the mid-nineteenth century. *See* Richard B. Bernstein with Jerome

Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 123 (1993). Petitioner's unsupported assertion that the practice "continued unabated" after the adoption of the Constitution is simply wrong. (Pet. Br. 13.) In addition, the vestigial examples of instructions that remained after the Framing were instructions from state legislatures to the United States Senators they appointed directly, a practice which was mooted by the adoption of the Seventeenth Amendment. *See* 2 George H. Haynes, *The Senate of the United States: Its History and Practice* 1027 (1938). Accordingly, these instructions are irrelevant to the constitutionality of the Missouri Provision.

Moreover, when instructions did crop up after the Framing, their desirability remained contested. For example, in citing the Twelfth Amendment as an example of the use of instructions to attempt to amend the Constitution, (*see* Kobach Br. 17), Kobach neglects to mention that Senators who opposed the practice vehemently criticized it in that instance. *See* Luce, *supra*, at 462-63 (quoting Senator William Plumer, who explained that four or five state legislatures had attempted to bind their federal representatives to favor the amendment but that "'the Legislatures throughout the Union will be told that they must adopt them because Congress, in its wisdom, has seen fit to propose them. We, because they have done it; they, because we have; with no independent action in either case. If such instructions are obligatory, we are mere machines.'"). Similarly, on the hotly debated issue of the re-charter of the Bank of the United States in 1811, Senator Timothy Pickering criticized instructions as incompatible with the Constitution's conception of representation:

> If State Legislatures undertake to dictate, by their instructions, or by requests which are intended to operate equally with instructions, what votes shall be given by their Representatives in Congress, they so far assume the powers vested by the Constitution exclusively in Congress. And if their instructions or

> requests are obeyed, then the State Legislatures, and not Congress, enact laws for the United States.

Luce, *supra*, at 464 (citation omitted in original). Finally, echoing the sentiments of the Framers who had rejected a constitutional right to instruct, Representative Calhoun criticized the practice when it appeared after the adoption of the Constitution: "The ear of this House on this subject, said he, is sealed against truth and reason. What has produced this magic spell? Instructions! Well, then, has it come to this? Have the people of this country snatched the power of deliberation from this body?" 30 *Annals of Cong.* 576 (1817). In light of this steady pattern of opposition, and the Framers' considered decision to reject a constitutional right to instruct, Petitioner's and her *amici*'s smattering of post-Framing and pre-Seventeenth Amendment examples of instructions to Members of Congress do not form any consistent or durable pattern of practice that deserves deference.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
JONATHAN J. FRANKEL
ANNE HARKAVY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae
League of Women Voters of the United States and
League of Women Voters of Missouri

Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

No. 99-929

In The

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JAMES MADISON CENTER FOR FREE SPEECH AS AMICUS CURIAE IN SUPPORT OF RESPONDENT DONALD J. GRALIKE SUGGESTING AFFIRMANCE

JAMES BOPP, JR.*
HEIDI K. MEYER
JAMES MADISON CENTER FOR FREE SPEECH
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500

Counsel of Amicus Curiae James Madison Center For Free Speech

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 1

I. THE RIGHT OF FREE SPEECH ENSHRINED IN THE FIRST AMENDMENT IS A RIGHT BELONGING PRIMARILY TO THE INDIVIDUAL 2

II. BALLOT LABELS COMPEL SPEECH AND, THEREFORE, INFRINGE ON THE CANDIDATE'S INDIVIDUAL SPEECH RIGHTS 5

III. IF A LAW IS REPUGNANT TO THE CONSTITUTION, THE COURT SHOULD NOT UPHOLD IT MERELY BECAUSE IT REFLECTS THE POPULAR WILL OF THE PEOPLE 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Bridges v. California, 314 U.S. 252 (1941) 13

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 11

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 12

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 7

Marbury v. Madison, 5 U.S. 137 (1803) 11

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 11

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 9

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 7

Pacific Gas & Electric Co. v. Public Utilities Comm. of California, 475 U.S. 1 (1986) 7

Police Department v. Mosely, 408 U.S. 92 (1972) 9

Procunier v. Martinez, 416 U.S. 396 (1974) 6

Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988) 7, 8

Romer v. Evans, 517 U.S. 620 (1996) 12

Saenz v. Roe, 526 U.S. 489 (1999) 11

Talley v. California, 362 U.S. 60 (1960) 9

TABLE OF AUTHORITIES – Continued

Page

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 6

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 12

West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943) 7, 10, 11

Wooley v. Maynard, 430 U.S. 705 (1977) 7, 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I. ..... *passim*

Mo. Const. art. VIII, §§ 15-22 ..... 6, 11

SCHOLARLY ARTICLES

Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA Law Rev. 1 (1997) 4

Emerson, *The System of Freedom of Expression* (1970) 3

Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963) 3

OTHER AUTHORITIES

James Madison, Property, Nat'l Gazette (March 27, 1792), reprinted in Robert A. Rutland, et al., eds., 14 The Papers of James Madison (Virginia 1983) 3

James Madison, Speech to House of Representatives (June 8, 1789), in Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Helen E. Veit et al. eds. 1991) 3

INTEREST OF AMICUS

The James Madison Center for Free Speech is an internal educational fund of the James Madison Center Inc., a not-for-profit corporation.[1] The purposes of the James Madison Center are to promote, through educational activities, respect for the rights of freedom of speech and freedom of association guaranteed by the First Amendment to the United States Constitution, and to defend the rights of freedom of speech and freedom of association when threatened by government action.

SUMMARY OF THE ARGUMENT

The right of free speech is deeply embedded in our nation's history. The Founding Fathers, particularly James Madison, had this right in mind when they drafted the First Amendment. To protect this right, the First Amendment demands that Congress shall make no law abridging the rights of free speech. Thus, the freedom of speech is a withholding of power from the government.

Despite this unequivocal denial of power, the Petitioner, through its ballot labels, abridges the free speech rights of candidates by forcing the candidate to speak on

---

[1] The parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

an issue, or, if the candidate refuses to speak, the ballot label speaks for him.

The individual candidate's free speech rights enjoy the full protection of the First Amendment and are not subservient to the people's collective right of free speech. At the heart of James Madison's view of the First Amendment lies the principle that each person should decide for himself the ideas and beliefs deserving of expression, consideration, and adherence. The First Amendment ensures that the government will not infringe on the individual's autonomy to choose the content of his own message.

ARGUMENT

I. THE RIGHT OF FREE SPEECH ENSHRINED IN THE FIRST AMENDMENT IS A RIGHT BELONGING PRIMARILY TO THE INDIVIDUAL.

A brief examination of the First Amendment's origins and its purposes provides the best defense to the Petitioner's erroneous argument that ballot labels do not violate the First Amendment.

The principal drafter of the First Amendment, James Madison, believed that individuals possessed a property right in their ideas and opinions just as they possessed a property right in their material goods. Special protection from government interference with the ability to transmit ideas and opinions was needed, however. James Madison explained that the purpose of a bill of rights was

> to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.

James Madison, Speech to House of Representatives (June 8, 1789), in Creating the Bill of Rights: The Documentary Record from the First Federal Congress 81 (Helen E. Veit et al. eds., 1991).

James Madison understood freedom of speech as a type of property right inhering in individuals. He wrote that every individual has "property in his opinions and the free communication of them." James Madison, Property, Nat'l Gazette (March 27, 1792), reprinted in Robert A. Rutland, et al., eds., 14 The Papers of James Madison 266 (Virginia 1983). As Thomas Emerson put it, "the purpose of society, and of its more formal aspect the state, is to promote the welfare of the individual." Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 880 (1963). While a "society may seek to achieve other or more inclusive ends," such as justice, equality, or an informed electorate, it generally may not do so by suppressing individual expression, which must be afforded "full protection" under the First Amendment. *Id.*; Emerson, The System of Freedom of Expression 17 (1970). The function of the First Amendment, then, is not to promote a collective interest in self-governance, but to prohibit regulation of a property interest – free speech – by the government.

James Madison's view of the First Amendment was formed in part from John Locke's natural rights theory that rights derive from the concept of liberty. The most basic meaning of liberty is self-determination – a person

is free if he is the author of his own thoughts and actions. Therefore, freedom has two important aspects. In a positive sense, it means the ability to actively determine one's own thoughts and actions. In a negative sense, it means independence from external forces.

Freedom, then, consists of the ability to determine one's own thoughts without interference from the government and others. Under Madison's view of the First Amendment, external forces may only regulate speech to prevent harm to life and property of others. Neither the government, nor the people, should have the power to control an individual's thoughts and beliefs in order to promote some current notion of democratic deliberation.

The collective right rationale for the First Amendment views speech as a means for promoting a particular form of government – in this case, a government limited by term limits – or as a means for promoting an important societal interest – better informed voters. Thus, rather than a fixed right to be protected from governmental interference, speech can be abridged if necessary to reach a collective good as defined by the majority. And as there are no inherent limits to desirable societal interests, a danger of this rationale is that it becomes a basis for justifying more regulation of speech.

This rationale views the First Amendment as a problem to be gotten around whenever it interferes with constructive social policy goals; the First Amendment becomes an obstacle or a loophole to government regulation. *See generally,* Bopp & Coleson, *The First Amendment is Not A Loophole: Protecting Free Expression in the Election Campaign Context,* 28 UWLA Law Rev. 1 (1997). This

approach begins with the proposition that the First Amendment is not an absolute and that many societal interests exist which permit speech to be regulated or punished.

Citing public apathy and ignorance, the Petitioner argues that regulation of speech through ballot labels is important to the functioning of our democracy. However, James Madison's rationale for protecting speech – preventing government interference – provides natural suspicion of this motive. Characterizing the interests of a majority as societal interests, and regarding the Petitioner as only implementing these interests, does not lessen the suspicion.

The Petitioner's idea of the First Amendment as a collective right of self-governance is not only completely at odds with the Madisonian view that free speech is an individual right, but naturally forms the basis of her argument that ballot labels are not compelled speech.

II. BALLOT LABELS COMPEL SPEECH AND, THEREFORE, INFRINGE ON THE CANDIDATE'S INDIVIDUAL SPEECH RIGHTS.

The logical outcome of the Petitioner's First Amendment rationale is that speech, as an instrument of the collective good, may be regulated if necessary to advance some cause of social reform. The tendency of those that hold the collective right rationale of the First Amendment is to jump to the conclusion that the First Amendment serves only the collective right rationale. Therefore, regulations consistent with the collective right of self-governance cannot be otherwise challenged under the

First Amendment. Such a view of the First Amendment enables one to ignore the free speech rights of the candidate. What is good for the public or the people trumps individual rights. However, the Court has acknowledged that the First Amendment "serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974). A Madisonian view of the First Amendment requires analysis of the constitutionality of Missouri's Article VIII from the perspective of the *candidate*.

With the adoption of the Australian Ballot system came state-prepared ballots. The idea of a government-printed ballot was seen as a progressive reform designed to reduce a variety of fraudulent election practices. Its end was to make elections better express the free choice of voters by increasing voter secrecy, reducing the corruption of party politics, and protecting the integrity of the voting process. To that end, states assumed the responsibility of preparing the ballot for the convenience of the voters and to avoid election fraud.

The ballot serves more than purely expressive purposes. Its primary purpose is to record voter preferences for tabulation. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (stating that "[b]allots serve primarily to elect candidates, not as forums for political expression."). But, the First Amendment dictates that the state cannot design the state-prepared ballot in a way that favors certain candidates or ideologies over others. Candidates do not check their First Amendment rights at the door when running for office. When viewed as a property interest in the free expression of ideas and thoughts, the First Amendment does not permit the collective good to

trump the rights of individuals, whether they are candidates for office or single pamphleteers.

This Court has recognized the importance of the First Amendment's protection of the individual's free speech rights. Previous cases have struck down government attempts to regulate an individual's right to speak in order to promote a collective public speech right. Therefore, the ballot label provision at issue here imposes a similar burden on candidates' First Amendment freedoms as previous government attempts to compel speech. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (state cannot force parade sponsor to include unit whose message it did not wish to choose or carry); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (charities need not disclose percentage of contributions for administration and fundraising expenses); *Pacific Gas & Electric Co. v. Public Utilities Comm. of California*, 475 U.S. 1 (1986) (utility cannot be forced to carry bill inserts provided by energy conservation public interest group); *Wooley v. Maynard*, 430 U.S. 705 (1977) (vehicle owner cannot be compelled to display state motto "Live Free or Die" on license plate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be forced to publish response to allegedly libelous article); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (school child cannot be compelled to salute flag).

The guiding principle behind these cases is that the speaker has the right to tailor the speech or to not speak at all. This Court asserted "the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely

and the right to refrain from speaking. . . . " *Wooley*, 430 U.S. at 714; *see also Riley*, 487 U.S. at 796-97 (stating that there is "some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). Therefore, the people, through the state's ballot, may not decide which issues have been ignored and slighted by candidates and thus must be placed on the ballot so that the public can hear viewpoints that would otherwise be obscured. This decision is not left to the people, but to the candidate for two reasons.

First, this right not to speak applies not only to expressions of belief or opinion, but also to statements of fact the speaker would rather avoid. *See Riley*, 487 U.S. at 797-98 (stating that both compelled statements of fact and compelled statements of opinion are forms of compulsion that burden the First Amendment right to speak). Contrary to the Petitioner's argument, it matters not that the ballot label may be truthful[2] – the speech is still

---

[2] It is not difficult to see the problems inherent in ensuring labels are not misleading. Labels could be drafted by the majority to gain electoral advantages. For example, if a group favoring the strengthening of the U.S. Department of Education were in the majority, it could pass a measure that requires candidates who do not support a law appropriating more money to the Department to run with a notation that states, "REFUSED TO STRENGTHEN EDUCATION." Similarly, a pro-life group could put a label such as "REFUSED TO STOP THE MURDERING OF INNOCENT BABIES" on candidates, while environmental groups could label candidates with the notation, "REFUSED TO STOP POLLUTION."

compelled. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (statute compelling disclosure of identity on documents distributed to influence voters violated the First Amendment); *Talley v. California*, 362 U.S. 60 (1960) (ordinance making it illegal to distribute any type of anonymous handbill violated the First Amendment).

Analogizing the ballot labels at issue in this case to nicknames, party designations, or residencies provides no justification. A candidate's choice to accept a party association is a voluntary act, whereas the imposition of a notation next to the candidate's name on the ballot is not. The notation is forced speech.

Groups that use the initiative process to place notations on the ballot force candidates to run on a given issue. Candidates then become powerless to shape their own messages because they are required to declare a position on an issue. Whichever stance the candidate takes,[3] he gets a ballot notation. The candidate is thus prevented from deemphasizing the issue.

Choosing what to emphasize in a campaign is the type of speech that falls within the First Amendment's purview and outside the reach of the government or the people. In *Mosely*, the Court stated that government "may not select which issues are worth discussing or debating in public facilities." *Police Dept. v. Mosely*, 408 U.S. 92, 96 (1972). Therefore, a candidate's free speech rights include

---

[3] Ballot notations that involve complex issues that are not susceptible to a binary, simplistic presentation provide an additional problem for candidates. The candidate is faced with only two unsatisfactory choices that do not reflect the universe of positions on the issue.

when, if at all, to address an issue, how to frame the issue, and the determination of the issue's importance or priority in the campaign's overall message. In James Madison's view then, an individual's ownership of his ideas and opinions necessarily requires dominion over the expression of those ideas and also over commitments to others regarding these ideas. *See Barnette*, 319 U.S. at 634 (stating that, "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").

The people are not left without ways to speak and comment on candidates' positions on issues. Issue advertisements or independent expenditures, by groups that are concerned about an issue, would serve the same stated purpose as ballot labels yet allow candidates to address, or ignore, the issue.

Second, the people's desire to receive "information" does not trump a candidate's free speech rights. Such information comes at the most crucial moment – the moment of decision. It is contradictory that the ballot label requires the candidate to provide information at the precise moment voters cast their ballots, while candidates themselves, are prohibited from campaigning within a certain distance of the polling place in order to give voters the information the candidate wants to provide.

III. IF A LAW IS REPUGNANT TO THE CONSTITUTION, THE COURT SHOULD NOT UPHOLD IT MERELY BECAUSE IT REFLECTS THE POPULAR WILL OF THE PEOPLE.

The Petitioner submits that Article VIII is not violative of the First Amendment because it is the people's message, rather than the government's. This distinction is without merit. *See West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech . . . may not be submitted to vote; they depend on the outcome of no elections.").

The very premise of judicial review, the system of checks and balances, and federalism is to protect the liberties of individuals against unconstitutional acts imposed by the majority through the government. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. 304, 344 (1816) ("The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity."); *Marbury v. Madison*, 5 U.S. 137, 179 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

The popularity of laws or amendments has been no obstacle to the willingness of this Court to strike down unconstitutional laws. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999) (holding a portion of California's attempt at welfare reform violated the Constitution, even though a great majority of citizens supported the reforms); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Court striking down the

Religious Freedom and Restoration Act, a law supported by many religious groups).

Similarly, the Supreme Court has not shied away from striking laws adopted by initiative that are unconstitutional "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981); *see also Romer v. Evans*, 517 U.S. 620 (1996) (overturning Colorado's Amendment 2, a law enacted by initiative which prevented localities from adopting special protections for homosexuals); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (overturning Arkansas's congressional term limits, which were enacted by initiative); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (striking down an Oregon constitutional amendment adopted by initiative limiting judicial review of punitive damages). Thus, any contention that Missouri's amendment is constitutional and entitled to deference, because it is a popular reflection of the will of the people, must fail.

The right to free speech is to be specially guarded against the democratic political process because of its unreliability and the First Amendment's place at the foundation of our democracy. The people of Missouri may not use the ballot to violate candidates' First Amendment rights any more than the government may.

> For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit

> language, read in the context of a liberty-loving society, will allow.

Bridges v. California, 314 U.S. 252, 263 (1941).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record
HEIDI K. MEYER
JAMES MADISION CENTER FOR FREE SPEECH
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500
Counsel for Amicus

Dated: August 14, 2000